(27,878)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 521.

UNION TOOL COMPANY, PETITIONER,

vs.

ELIHU C. WILSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page.
Caption	*a*
Record from district court of the United States for the southern district of California	1
Names and addresses of counsel	1
Writ of error	1
Citation and service	4
Interlocutory decree	6
Writ of injunction	14
Motion to punish for contempt	17
Order to show cause	18
Affidavit of W. W. Wilson	20
E. C. Wilson	24
Frank F. Lamb	28
Exhibit A —Tag, &c.	31
B^1—Tag, &c.	32
B^2—Tag, &c.	32
E —Tag, &c.	35
B —Tag, &c.	36
C —Tag, &c.	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 21, 1921.

Page.

Affidavit of G. A. Montgomery 39
Reg. P. Fox 44
E. C. Wilson 50
Exhibit A—Tag, &c 54
Stipulation as to facts 56
Oral opinion 59
Decree in contempt 94
Petition for writ of error 100
Order allowing writ of error 101
Bond 103
Assignment of errors 106
Præcipe for transcript of record 109
Clerk's certificate 110
Petition for cross-writ of error 113
Order allowing cross-writ 116
Proceedings in U. S. circuit court of appeals 119
Notice of motion to dismiss writ of error 121
Motion to dismiss writ of error 122
Submission of motion 125
Order filing opinion 126
Opinion by Hunt, J 127
Judgment 135
Order denying rehearing 136
Order staying mandate 137
Clerk's certificate 139
Writ of certiorari 140
Stipulation as to return 141
Return to writ of certiorari 143

No. 521

~~No. 3397~~

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United States

Circuit Court of Appeals

For the Ninth Circuit.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys.

For Complainant and Plaintiff in Error:

GEORGE B. WILSON, 2301 East Vernon Avenue, Los Angeles, California.

For Defendant and Defendant in Error:

FREDERICK S. LYON, 504–7 Merchants Trust Building, Los Angeles, California;

A. V. ANDREWS, Union Oil Building, Los Angeles, California.

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings as also in the rendition of the judgment and decree which is in the said District Court, before you in a certain proceeding in contempt had upon a certain order to show cause, made, issued and entered by you and entitled in equity suit before you known and identified as No. A.–4—B.–62 Consolidated, in which equity suit Elihu C. Wilson is complainant and Union Tool Com- defendant, and wherein a writ of injunction had been and was on November 6th, A. D. 1918, issued out of and under the seal of your court, and directed to said defendant, Union Tool Company, and its officers and attorneys, and on November 14th, A. D. 1918, same was served on defendant, Union Tool

Company, and on Edward Double, its president, Will Stewart, its vice-president, and P. W. Masten, its secretary, by which order to show cause the Union Tool Company and its said officers were cited and ordered to be and appear before you "and show cause, if any there be, why the said Union Tool Company in and by its said officers, and such others as may be shown to have violated such writ of injunction, should not be punished as and for contempt in failing, refusing and neglecting to comply with the injunction and command of this Court," a manifest error has happened to the great damage of Elihu C. Wilson, as by his assignment of errors appears, we being willing that error, if any there be, should be duly corrected, and full justice done to the party aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at the City of San Francisco, in the [1*] State of California, on the eighth day of October next, in the said United States Circuit Court of Appeals, to be then and there heard, that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, if any there be, what of right should be done according to the laws of the United States.

WITNESS, the Hon. EDWARD D. WHITE, Chief

*Page-number appearing at foot of page of original certified Transcript of Record.

Justice of the United States, this 18th day of September, in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the United States the one hundred and forty-fourth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy.

The above writ of error is hereby allowed.

ROSS,
Circuit Judge.

I hereby certify that a copy of the within writ of error was on the 18th day of September, 1919, lodged in the office of the clerk of the said United States District Court, for the Southern District of California, Southern Division, for said defendants in error.

[Seal] CHAS. N. WILLIAMS,
Clerk U. S. District Court, Southern District of California.

By R. S. Zimmerman,
Deputy. **[2]**

[Endorsed]: No. A.–4—B.–62—Eq. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—A.–4—B.–62 (Consolidated). Writ of Error. Filed Sep. 18, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. **[3]**

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To the Union Tool Company and Edward Double, Its President, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 8th day of October, A. D., pursuant to a writ of error on file in the clerk's office of the District Court of the United States, in and for the Southern District of California, in that certain proceeding in contempt had upon a certain order to show cause, made, issued and entered and entitled in equity suit known and identified as No. A.-4—B.-62, Consolidated, in which equity suit Elihu C. Wilson is complainant and the Union Tool Company is defendant, and wherein a writ of injunction had been and was on November 6th, A. D. 1918, issued out of and under the seal of the court and directed to said defendant, Union Tool Company, and on Edward Double, its president, Will Steward, its vice-president, and P. W. Masten, its secretary, by which order to show cause the Union Tool Company and its said officers were cited and ordered to be and appear before the Court "and show cause, if any there be, why the said Union Tool Company in and by its officers, and such others as may be shown to have violated such writ of injunction, should not be punished as and for contempt in failing, refusing and neglecting to comply with the injunction and command of this Court," and you are

defendants in error to show cause, if any there be, why the order, judgment or "Decree in Contempt" in the said proceedings, should not be corrected, and why full justice should not be done to the parties in that behalf.

WITNESS the Honorable ERSKINE M. ROSS, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 18th day of September, A. D. 1919, and of the Independence of the United States, the one hundred and forty-fourth.

ROSS,
Circuit Judge. [4]

Received a copy of the foregoing citation this 18th day of September, A. D. 1919.

FREDERICK S. LYON,
Attorney for Defendant in Error.

Received a copy of the foregoing citation this 18th day of September, A. D. 1919.

ROBERT O'CONNOR,
U. S. Attorney.
By MILTON BRYAN,
Asst. U. S. Atty. [5]

[Endorsed]: No. A.-4—B.-62—Eq. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—A.-4—B.-62 (Consolidated). Citation. Filed Sep. 18, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy. [6]

United States District Court, Southern District of California, Southern Division.

IN EQUITY.

Nos. A.–4—B.–62 CONSOLIDATED (Known as A.–4 Consolidated).

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Interlocutory Decree.

The above consolidated suits having come on regularly for final hearing before the Court upon the proofs and proceedings taken and had on behalf of the respective parties, and the suits having been submitted to the Court upon argument and briefs of Raymond Ives Blakeslee on behalf of complainant and Frederick S. Lyon on behalf of defendant, and due time having been taken for consideration thereof:

IT IS ORDERED, ADJUDGED AND DECREED:

I.

That complainant Elihu C. Wilson, was the original, first and sole inventor of the underreamer set forth, described, disclosed and claimed in letters patent of the United States No. 827,595, granted and issued the 31st day of July, 1906; that said letters patent are good and valid in law, particularly as to *to* claims 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 19 thereof; that the said invention was not known or used by others, before the said Elihu C. Wilson's in-

vention or discovery thereof, or more than two (2) years prior to the application of said Elihu C. Wilson for said letters patent, nor patented nor described in any printed publication in the United States of America or any foreign country before the said Elihu C. Wilson's invention or discovery [7] thereof, or more than two (2) years prior to his application for said letters patent in the United States of America, nor in public use or on sale in the United States of America for more than two (2) years prior to said application of said Elihu C. Wilson for said letters patent, nor patented in any foreign country on an application filed more than twelve (12) months prior to filing of said application by said Elihu C. Wilson for said letters patent in the United States, and not abandoned; that said letters patent No. 827,595 were issued in due form of law and after due examination and procedure by the Commissioner of Patents as to the novelty and patentability and utility of said invention; that by the said letters patent there was granted and secured to the said Elihu C. Wilson, his heirs, legal representatives and assigns, for the term of seventeen (17) years from and after the 31st day of July, 1906, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the Territories thereof; that prior to the granting and issuance and delivery of said letters patent all proceedings were had and taken which were required by law to be had and taken prior to issuance of letters patent for new and useful inventions; and that the

title to said letters patent is in the complainant, as alleged in the bill of complaint.

II.

That the invention set forth, described, disclosed and claimed in and by said letters patent No. 827,595 is of great value and has been extensively practiced by the complainant; that immediately after the production of said invention by said Elihu C. Wilson underreamers embodying and containing the said invention went into extended and general use and largely displaced all other underreamers or tools for the purposes for which such underreamers or tools are intended, and became, together with the underreamers manufactured by the [8] defendant herein, the underreamers in general use in the State of California and elsewhere in underreaming wells; that the trade and public and users of such underreamers and kindred tools have generally respected, acknowledged, and acquiesced in the validity and scope of said letters patent, and the exclusive rights and title of complainant in, to and under said letters patent, and the validity and scope of said letters patent and the title of complainant thereto have been generally acknowledged, respected and acquiesced in by all manufacturers except the defendant herein and its predecessors in interest, and save and except for the wrongful and unlawful acts of the defendant herein in infringement of said letters patent, complainant would have been in the continued and exclusive enjoyment and possession of all the rights, liberties and privileges under, and all the right, title and

interest in, to and under, said letters patent, and the same would have been of great and incalculable benefit and advantage to complainant; that upon each and every one of said underreamers manufactured, used or sold by or for complainant, since the date of the granting, issuance and delivery of said letters patent, the word "patented," together with the day and date of the issuance of said letters patent, to wit, July 31st, 1906, have been plainly marked or stamped, thereby notifying the public of the said letters patent; that the defendant, long prior to the commencement of this suit and the filing of the bill of complaint herein, had full, complete and personal knowledge of, and had been notified in writing of, the granting and issuing of said letters patent No. 827,595, and of complainant's rights under said letters patent, and prior to the commencement of the wrongful and unlawful and infringing acts of defendant had full knowledge and notice of the grant, issuance and delivery of said letters patent to complainant, and of complainant's rights thereunder, and demand had been made upon defendant to respect the said letters patent and not to infringe thereon, but that notwithstanding such notice the defendant has made, used, leased or sold or leased and [9] sold, and has continued to make, use, lease or sell or lease and sell underreamers embodying the said invention of said letters patent No. 827,595.

III.

That the two suits Nos. A.–4 and B.–62 consolidated and joined and merged together to constitute this unitary cause of action were, upon order of the

Court, duly and properly consolidated, merged and joined together, whereby the pleadings, proofs, proceedings and offers in evidence of the parties in each of such suits became and are the pleadings, evidence, proceedings and proofs of the parties in such consolidated suit or cause of action, whereby the defendant herein further was, as to any such pleadings, proceedings, evidence and proofs of infringement and wrong doing charged therein, charged with infringement of claims 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 19 of the said letters patent No. 827,595.

IV.

That defendant has infringed upon said letters patent, and particularly upon claims 9 and 19 thereof, which are as follows:

> 9. An underreamer body terminating in prongs forming a fork and provided with shoulders on the inner faces of the prongs which form cutter-ways and terminate in downwardly-projecting lugs, and cutters mounted between the prongs of said fork and having shoulders inside the fork and faces to bear on the projecting lugs.
>
> 19. An underreamer comprising a body terminating in two prongs, and cutters each having two shoulders and a bearing-face on the inner side of each of the two shoulders to engage said prongs,—

by the manufacture and sale or lease, or sale and lease of the so-called "Double Improved" and "Type F. Underreamers" like "Complainant's Exhibit Improved Double Reamer and Cutters" and "Complain-

ant's Exhibit Defendant's Reamer Type D," and "Complainant's Exhibit Reamer Type E," and "Complainant's Exhibit Reamer Type F"; and that each of said Double underreamers or said underreamers like said complainant's exhibits embodies and contains and embraces the invention patented in and by [10] said letters patent No. 827,595, and particularly embraced within each of said claims 9 and 19; that each of said Double underreamers or reamers like said mentioned complainant's exhibits is an infringement upon each of said claims 9 and 19 of said letters patent No. 827,595, but not upon the other or any other claims thereof; that each of said Double underreamers or underreamers like said complainant's exhibits was and were manufactured and sold or leased or sold and leased by defendant without the license or consent or permission and also against the will of complainant, and in infringement and violation of said letters patent No. 827,595 and of the exclusive rights and privileges and liberties thereby granted and secured to complainant.

V.

That defendant, its officers, directors, attorneys, agents, servants, workmen, employees and assistants, and each and every of them, be perpetually enjoined and restrained from manufacturing or causing to be manufactured, using or causing to be used, leasing or causing to be leased, selling or causing to be sold, in any manner, either directly or indirectly, any underreamer or underreamers like or embodying the construction or inter-relation or formation of parts of either "Complainant's Exhibit Improved Double

Reamer and Cutters," or "Complainant's Exhibit Defendant's Reamer Type D," or "Complainant's Exhibit Reamer Type E," or "Complainant's Exhibit Reamer Type F"; and from manufacturing or causing to be manufactured, selling or causing to be sold, using or causing to be used, leasing or causing to be leased any part or parts or elements calculated and intended to be combined or used as a part or feature of any underreamer or device in infringement of said letters patent No. 827,595, that is of claims 9 and 19 thereof, in any manner whatsoever, or from manufacturing, or causing to be manufactured, using or causing to be used, selling or leasing or causing to be sold or leased, [11] either directly or indirectly, any combination of parts or elements or features capable of being assembled together or used in infringement of said letters patent No. 827,595, that is of claims 9 and 19 thereof.

VI.

That complainant recover of the defendant the profits, gains and advantages which said defendant has derived, received, realized or made by reason of said infringement by defendant; and that complainant recover of said defendant any and all damages which complainant has sustained or shall sustain by reason of said infringement by defendant.

VII.

And it is hereby referred to Lynn Helm, Esq., as Special Master of this court, who is appointed *pro hac vice* to take and state the account of said gains, profits and advantages and to assess such damages,

and to report thereon with all convenient speed, and the said Union Tool Company, its officers, directors, attorneys, agents, servants, employees, workmen and assistants, and each of them, is and are hereby directed and required to attend before said Special Master from time to time as he may require, and to produce before him such books, papers, vouchers, documents, records or other things, and to submit to such oral examination, as the special master may require.

VIII.

That complainant do have and recover judgment against defendant Union Tool Company for the sum of $631.64, being eighty (80%) per cent of complainant's otherwise full costs and disbursements herein, minus Forty Dollars ($40.00); and that the further questions of increase of damages be reserved **[12]** until the coming in of the special master's report.

Dated September 8, 1916.

EDWARD E. CUSHMAN,
District Judge.

Decree entered and recorded Sept. 8, 1916.

WM. M. VAN DYKE,
Clerk.
By T. F. Green,
Deputy.

(Endorsed): In Equity—Nos. A.–4—B.–62 Consol. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. Interlocutory Decree. Filed Sep. 8, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Raymond

Ives Blakeslee, 728–30 California Building, Los Angeles, Cal., Solicitor for Complainant. [13]

In the United States District Court, Southern District of California, Southern Division.

Nos. A.–4—B.–62—EQUITY, Consolidated.
(A.–4, Consolidated.)

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Writ of Injunction.

The President of the United States of America, to Union Tool Company, Its Officers, Directors, Attorneys, Agents, Servants, Workmen, Employees and Assistants, GREETING:

Whereas, Elihu C. Wilson has filed on the Chancery side of the District Court of the United States for the Southern District of California, in the Southern Division thereof, a bill of complaint against Union Tool Company, and has obtained an allowance of an injunction as prayed for in said bill, and an order and decree allowing such injunction has been affirmed by the Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, we having regard to the matters in said bill of complaint contained, do hereby command and strictly enjoin you, the said Union Tool

Company, your officers, directors, attorneys, agents, servants, workmen, employees and assistants, and each and every of you, to forthwith and immediately refrain from manufacturing or causing to be manufactured, using or causing to be used, leasing or causing to be leased, selling or causing to be sold, in any manner, either directly or indirectly any underreamer or underreamers like or embodying the construction or inter-relation or formation of parts of either "Complainant's Exhibit Improved Double Reamer and Cutters," or "Complainant's Exhibit Defendant's Reamer Type 'D,'" or "Complainant's Exhibit Reamer Type 'E,'" or "Complainant's Exhibit Reamer Type 'F'" (being exhibits offered and received **[14]** in evidence in this cause) and from manufacturing or causing to be manufactured, selling or causing to be sold, using or causing to be used, leasing or causing to be leased any part or parts or elements calculated and intended to be combined or used as a part or feature of any underreamer or device in infringement of letters patent No. 827,595 (being the letters patent sued on in this cause), that is, of claims 9 and 19 thereof, in any manner whatsoever, or from manufacturing or causing to be manufactured, using or causing to be used, selling or leasing or causing to be sold or leased, either directly or indirectly, any combination of parts or elements or features capable of being assembled together or used in infringement of said letters patent No. 827,595, that is, of claims 9 and 19 thereof; which commands and injunction you are respectfully required to observe and obey.

Hereof fail not under penalty of the law thence ensuing.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 6th day of November, 1918.

[Seal] Attest: CHAS. N. WILLIAMS, Clerk of the United States District Court, Ninth Judicial District, Southern District of California, Southern Division.

By R. S. Zimmerman,
Deputy Clerk. [15]

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,
So. District of Cal.,—ss.

I hereby certify and return that I served the annexed injunction on the therein named Union Tool Co. by handing to and leaving a true and correct copy thereof with Edward Double, President, P. W. Marsten, Secy., and Will Stewart, Vice-pres., of said Union Tool Co., personally at Los Angeles, in said District, on the 14th day of November, A. D. 1918.

C. T. WALTON,
U. S. Marshal.
By J. W. Bell,
Deputy.

[Endorsed]: Marshal's Civil Docket No. 3642. Nos. A.-4—B.-62—Eq., Consol. In the United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant,

vs. Union Tool Co., Defendant. In junction. Copy of within left at office of Frederick S. Lyon at 4:30 P. M., Nov. 1, 1918, Mr. Lyon being in attendance at trial in New York City at that time. Leonard S. Lyon. Filed Nov. 26, 1918. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal., Solicitor for Complainant. **[16]**

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. A.–4—B.–62, Consolidated.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Motion for Punishment for Contempt of Court.

Comes now the complainant by counsel and moves that defendant Union Tool Company and its officers, to wit, Edward Double, president, William Stewart, vice-president, and P. W. Masten, secretary, and such other and further officers, agents, employees, workmen and others as may appear to have violated the injunction issued out of and under the seal of this Court in accordance with the interlocutary decree of this Court, dated July 8, 1916, be pun-

ished for contempt of court, or otherwise dealt with as may appear proper, for violation of such injunction, to wit, the writ of injunction issued out of this court November 6th, 1918.

This motion will be made upon the pleadings, proofs, records and proceedings on file and of record in said cause and upon the affidavits hereto affixed and made a part of this motion.

G. BENTON WILSON,
RAYMOND IVES BLAKESLEE,
Solicitors and Counsel for Complainant. **[17]**

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. A.-4—B.-62, Consolidated.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Order to Show Cause.

Upon reading and filing the motion of complainant that defendant in said cause be punished for contempt of court, or otherwise dealt with as may appear proper, and upon reading and filing the affidavits upon which said motion is based, it appearing therefrom that the said Union Tool Company, and its

several officers and others are charged with contempt of Court for violation of the writ of injunction heretofore issued in said cause, it is hereby ordered that the said Union Tool Company, in and by its officers, to wit, Edward Double, president, William Stewart, vice-president, and P. W. Masten, secretary, be and appear before this Court on Monday, the 5th day of May, 1919, at ten o'clock A. M., in the courtroom of said court in the Federal Building, Los Angeles, California, and show cause, if any there be, why the said Union Tool Company in and by its said officers, and such others as may be shown to have violated such writ of injunction should not be punished as and for contempt in failing, refusing and neglecting to comply with the injunction and command of this Court; and it is further ordered that a copy of this order, the said motion and the affidavits upon which it is based, be served on the said Union Tool Company, by its proper officers, not later than the 28th day of April, 1919.

Dated April, 1919.

By the Court:

BLEDSOE,
Judge. [18]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. A.–4—B.–62, Consolidated.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Affidavit of W. W. Wilson, Dated April 23, 1919.

Now comes W. W. Wilson, resident of Los Angeles, County of Los Angeles, State of California, and being duly sworn according to law deposes and says:

That he is the vice-president of the Wilson and Willard Manufacturing Company, a corporation organized under the laws of the State of California, and whose principal place of business is located at 2301 East Vernon Avenue, City of Vernon, County of Los Angeles, State of California.

That he is familiar with the construction and use of well-drilling devices particularly underreamers and those manufactured by the Wilson and Willard Manufacturing Company under the Wilson Patent, as well as those manufactured by the Union Tool Company of Torrance, County of Los Angeles, State of California, under the Double patent.

That his employment requires him to frequently visit the several oil fields of Southern California for

the purpose of informing himself at all times of the numbers and types of well-drilling devices used in said fields.

That since November 6th, 1918, he has seen numerous newly manufactured Double Underreamers and parts therefor in said oil fields, and constantly sees new Double Underreamers and repair and spare parts therefor, arriving in said fields and bearing shipping tags from the aforesaid Union Tool Company's Plant, at Torrance, County of Los Angeles, State of California.

That many of these spare parts such as the cutters are identical with the cutters used in Improved Double Underreamers, **[19]** the manufacture, sale and use of which Improved Double Underreamers, Cutters and other spare and repair parts therefor is prohibited by the injunction of this Court.

That the said Union Tool Company is extensively manufacturing and shipping to the oil fields an underreamer and parts therefor which is designated in an advertisement as "Pocket Type Double Underreamer" as shown by the two correction sheets issued by the said Union Tool Company to its customers to be inserted in said Company's Catalog so as to cancel and take the place of its advertisement of the "Improved Double Underreamer" now under injunction as aforesaid. Copies of these correction sheets are attached hereto and marked exhibit "A."

That this so-called "Pocket Type Double Underreamer" differs in no respect from the Double Improved Underreamer excepting that small triangular

fillets of metal are left at the sides of the lower end of the hollow slotted extension as shown by the photograph attached hereto and marked exhibit "B" and which shows in comparison the bodies of a Double Improved Type and a Double Pocket Type Underreamer. This photograph was taken by deponent on April 5th, 1919, in the Standard Oil Company's scrap-yards at Taft, County of Kern, State of California.

That these fillets of metal do not change in any manner whatsoever the mode of operation of the underreamer nor differentiate it in any manner or degree from the Double Improved Underreamer covered by said injunction. Also the several parts of said Pocket Type Double Underreamer such as the cutter, rod, spring, and keys are identical with and are used, interchangeably with the same parts of the Double Improved Underreamer bodies aforesaid.

That the cutters purporting to be furnished by the said Union Tool Company for this so-called "Pocket Type Double Underreamer" are being shipped into the several oil fields of Southern California in large numbers by the Union Tool Company's **[20]** Plant aforesaid, and that these cutters usually bear a small paper tag pasted thereon and containing the printed inscription "Made for Pocket Type Reamer."

That the Union Tool Company aforesaid is manufacturing, advertising and offering for sale and selling still another so-called type of underreamer which said Company designates as its "Type U Double Undeareamer." This underreamer is the same as

the so-called "Pocket Type Double Underreamer" excepting for slight changes which are colorable only and obviously intended to cause it to appear different from the "Doube Improved Underreamer." These changes consist of walls left in the back of the cutters at the sides of the notch and flush with the sides of the cutter shanks so as to transform the notch into a rectangular box-like recess. The Pocket Type Double Underreamer body is then altered by planing two grooves in each of the opposite parallel bearing faces to accommodate these walls at the sides of the notch in the cutter. The effect accomplished is merely to remove a little material from the hollow slotted extension and add it to the cutter shank. Neither the operation of the underreamer nor the object it accomplishes differ in mode or degree from the operation and results obtained by the Double Improved Underreamer covered by said injunction. The Double Improved Cutters can be used in this so-called Type U body and Double Improved Bodies can be and are being readily altered to accommodate these Type U. Cutters. Likewise these Type U Cutters can be readily altered by any Tool Dresser or Blacksmith so as to be used in the Double Improved Underreamer Bodies. Two photographs marked exhibit "C" and exhibit "D" illustrating this Type U Double Underreamer and Cutter are attached hereto and made a part of this affidavit.

The deponent has seen and closely examined these Types U and Pocket Type Underreamers and verily believes that not by accident but by skilful design

they have been constructed so their several elements can be and are being, in violation of [21] said injunction, used as a method of supplying spare and repair parts for the numerous infringing underreamers the defendant Union Tool Company has previously sold.

W. W. WILSON.

Subscribed and sworn to before me this twenty-third day of April, 1919.

[Seal] D. R. BRUNHAM,

Notary Public in and for said Los Angeles County, California.

My Commission expires August 12, 1922.

[Endorsed]: In the United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—No. A.-4—B.-62, Consolidated. [22]

State of Oklahoma,
County of Tulsa,—ss.

Affidavit of E. C. Wilson, Dated March 19, 1919.

E. C. Wilson, being first duly sworn, deposes and says:

That he is a citizen of Los Angeles, California, and is president of the Wilson & Willard Mfg. Company, a firm located in the city of Los Angeles, and engaged in the manufacture of certain oil well tools and machinery, that its products, one of which is the Wilson Underreamer, are sold principally through the

various oil well supply companies throughout the United States and foreign countries.

That by reason of dealings with the different supply companies he is familiar with the goods they handle, particularly, underreamers of competing makes, and by what firms and on what basis they are handled.

Deponent also states that the Continental Supply Company, a firm doing a general oil well supply business, and whose principal place of business is in St. Louis, Mo., is a recognized agent of the tools and machinery manufactured by the Union Tool Company, of West Chicago, and Los Angeles, and that this is particularly the case in regard to the Double Underreamers.

Deponent states that not only do they advertise that they are the Agents for the Double Underreamer, such being well established throughout the Mid-Continent oil fields, but, while endeavoring to persuade them to stock Wilson underreamers, affiant has been assured by Mr. C. C. Lemon, Sales Manager, of the Continental Supply Company's Tulsa store, also by Mr. D. D. Myers, Manager of their Tulsa Division, and also by Mr. Wilkinson, General Purchasing Agent, and located in St. Louis, that their connections with the Union Tool Company, being the Union Tool Company's authorized Agent for the Double underreamer made it impossible for them to consider stocking Wilson underreamers.

That the above statements were made to affiant during the fall of 1918, and that on this day he was

assured by Mr. F. J. Hinderliter, manager of the tool department of the Oil Well Supply Company's Oklahoma division, that they understand that the Continental Supply Company is at present a recognized agent for Double underreamers, that his company frequently purchases Double underreamers, or extra parts for same, obtaining them of the Continental Supply Company, where a complete stock of Double underreamers is carried.

Deponent further states that from his own observation the various stores of the Continental Supply Company carry Double Underreamers in stock, receiving them direct from the Union Tool Company's West Chicago plant, same being so tagged, and marked by the Union Tool Company's shipping tags when received and placed in stock; that such underreamers and extra parts are being received from the Union Tool Company even up to a very late date; that the affiant was assured by one of the employees of the Continental Supply Company that they were **[23]** now expecting a large shipment of Double underreamers and extra parts for their Tulsa store; that affiant further states that he personally saw a large quantity of cutters for Double Improved Underreamers on the floor of the Continental Supply Company's Tulsa store, same being about ten days ago, and was then assured by one of the employees of said store that they were selling Double improved underreamer cutters in large quantities; that within the last two months a quantity of cutters of the same

type of at least twice the quantity then on the floor have been received from Chicago and sold.

Affiant further states that on or about March 8th, 1919, Mr. J. C. Sloan, President of the Oklahoma Tool & Supply Company, informed him that they had been carrying Double improved underreamers and extra parts for same, based upon an understanding, viz., by a letter from the Union Tool Company, that that company would protect the Oklahoma Tool & Supply Company from any damages which they might sustain through litigation; that affiant was assured by employees of the Oklahoma Tool & Supply Company, that Double improved underreamers and extra parts for same have been received in Tulsa as late as February 21st, 1919. Furthermore, affiant states that he, himself, saw Double Improved Underreamers in the store of the Oklahoma Tool & Supply Company in Tulsa, bearing the Union Tool Company's tags, showing same were shipped to the Oklahoma Tool & Supply Company, at Tulsa, Oklahoma, from the West Chicago plant of the Union Tool Company, and that at least one such tag, viz.: the tag then on a 5-3/16" Double Improved Underreamer, No. 9109, had noted on the back thereof, that same had been received February 21st, 1919, and which is in accord with information provided as above stated.

The affiant further states that he has been informed by different employees of the Oklahoma Tool & Supply Company that they, namely, the Oklahoma Tool & Supply Company, are agents for the Double Underreamer, buying same direct of the Union Tool

Company West Chicago, Illinois. That affiant has also been informed that said Company was the recognized agent of the Double underreamer, even before the Continental Supply Company obtained an agency for the same reamer.

E. C. WILSON.

Subscribed and sworn to before me this the 19th day of March, 1919.

[Seal] BEULAH A. HULL,
Notary Public.

My commission expires March 27th, 1922. **[24]**

United States District Court, Southern District of California, Southern Division.

A.–4—B.–62, Consolidated.

E. C. WILSON,
Plaintiff,

vs.

UNION TOOL CO., a Corporation,
Defendant.

Affidavit of Frank F. Lamb, Dated March 12, 1919.

State of Oklahoma,
Tulsa County,—ss.

Frank F. Lamb, being duly sworn and upon oath, deposes and says:

That on March 12th, 1919, he visited the Oklahoma Tool & Supply Company at their place of business in Tulsa, Oklahoma, in company with E. C.

Wilson, of Los Angeles, California; that he was there shown a number of Double Improved Underreamers of various sizes and that after looking over the stock he selected an underreamer, known as 5-3/16"-17# Double Improved Underreamer; that he purchased and paid for the said Double Improved Underreamer, and had the same delivered to him by the said Oklahoma Tool & Supply Company; that said underreamer was stamped "9109." That affiant paid the Oklahoma Tool & Supply Company for the said underreamer complete the sum of $367.50, and obtained therefor a receipted invoice, which invoice is hereto attached and marked Plaintiff's Exhibit "C." That said underreamer was identified by tag attached thereto, and marked Plaintiff's Exhibit "A," a duplicate copy of which is hereto attached, and marked, Plaintiff's Exhibit "A." That at the time affiant purchased the said underreamer there was attached to the said underreamer a tag, which was an ordinary shipping tag, and upon which was printed in bold black type the words "From [25] Union Tool Co., Manufacturers of Oil Well Drilling Tools, Heavy Forgings, Fishing Tools, Bits and Jars a Specialty, West Chicago, Ill., U. S. A." That upon said tag was stamped in red ink the words, "The Oklahoma Tool & Supply Company, Tulsa, Oklahoma." That when the said underreamer was delivered to the affiant in the city of Tulsa, the above-described tag had been torn from the said underreamer, and the wire with which it was attached and the eye of the tag were still attached to the underreamer.

That upon the same date, in the city of Tulsa, Oklahoma, this affiant purchased from the Continental Supply Company of Tulsa, Oklahoma, a set (2) of 8¼" cutters for Double Improved Underreamer, said cutters to be used in 8¼"–28# casing; that the said underreamer cutters were stamped as follows; one being marked L–67, and the other being marked L–43; that affiant paid the Continental Supply Company for the said underreamer cutters the sum of $73.30. That affiant took from the Continental Supply Company, a receipted invoice, No. 2961, dated March 12th, 1919, which receipt invoice is hereto attached, and marked Plaintiff's Exhibit "D." That the said underreamer cutters were delivered to the affiant in the city of Tulsa, and affiant attached thereto a tag for identification to each cutter, one of which tags is marked Plaintiff's Exhibit "B–1" and to the other, Plaintiff's Exhibit "B–2."

That when the said underreamer cutters were purchased by the plaintiff, they had attached to one of the said cutters a shipping tag, which was printed in bold black type, "From Union Tool Company, Manufacturers of Oil Well Drilling Tools, Heavy Forgings, Fishing Tools, Bits and Jars a Specialty; West Chicago, Ill., U. S. A." That there was printed with rubber stamp upon said tag, in red ink, the words, "The Continental Supply Company, Tulsa, Oklahoma." Also said tag bore the following, "Order No. 35326." That said tag is attached to this affidavit, and marked Plaintiff's Exhibit "E," [26] That when the said cutters were purchased from the Continental Supply Company at

Tulsa, affiant was told by one of the men who was working for said Continental Supply Company that the said cutters had been received from the Union Tool Company at Chicago, Ill., about three weeks prior to said March 12th, 1919.

That both the underreamer and the cutters were taken to the Nichols Transfer Company in Tulsa, Oklahoma, and there in the presence of the affiant, E. C. Wilson, instructed the Nichols Transfer Company to properly crate the said underreamer and cutters, and ship them by express to the Wilson & Willard Manufacturing Company, Los Angeles, California.

Further affiant saith not.

FRANK F. LAMB.

Subscribed and sworn to before me this the 12th day of March, 1919.

[Seal] BEULAH A. HULL.

My commission expires March 27th, 1922. [27]

United States District Court,
Southern District of California,
Southern Division.

A.–4—B.–62, Consolidated.

E. C. WILSON,

Plaintiff,

vs.

UNION TOOL CO., a Corporation,

Defendant.

(Seal)

Exhibit "A." [28]

United States District Court,
Southern District of California,
Southern Division.

A.–4—B.–62, Consolidated.

E. C. WILSON,

Plaintiff,

vs.

UNION TOOL COMPANY, a Corporation,

Defendant.

(Seal)

Exhibit "B 1." [29]

United States District Court,
Southern District of California,
Southern Division.

A.–4—B.–62, Consolidated.

E. C. WILSON,

Plaintiff,

vs.

UNION TOOL COMPANY, a Corporation,

Defendant.

(Seal)

Exhibit "B 2." [30]

General Offices:
Tulsa, Okla.

Branch Stores:
Bartlesville.
Drumright.
Okmulgee.

OKLAHOMA TOOL & SUPPLY CO.

Oil and Gas Well Supplies, Pumping Jacks, Rig Irons, Casing Line Pipe and Tubing, Pull and Sucker Rods, American Wire Lines, Cordage, Mill Supplies.

FRANK F. LAMB.

Sold to	Tulsa, Okla., 3/12/19.
Address	Our order 41471
Shipped to	Your order
Destination	Ordered by—Lamb
Via Call	Salesman—Allen
Car No.	F. O. B.
Lease.	Well No.

Terms: Unless otherwise specified, 2 per cent discount if paid by the 20th of month following purchase. No discount allowed on freight or second hand goods. Interest charged after 60 days. All claims must be made within 30 days. Railroad company's receipt for merchandise in good order constitutes delivery. To obtain allowance for shortage or damage, customer must have railroad agent note condition of shipment on freight bill.

1	5/3/16" 17# Double Improved Under-reamer #9109. With Std. Pin & Square	500.00	500.00	25%	375.00
	Complete With Tools		Less	2%	7.50
					367.50

Rec'd payment 3/12/19.

C. SHUPERT.

(Notarial Seal)

We hereby guarantee that the articles or commodities herein listed were manufactured or produced by us in accordance with the federal child labor law of September 1, 1916, or were purchased by us under a guarantee that in their manufacture or production, all the requirements of said law had been complied with.

OKLAHOMA TOOL & SUPPLY CO. [31]

Form 103-10-1-18—3M Bks.

Tulsa, Okla., March 12, 1919.

No. 2961. Duplicate.

THE CONTINENTAL SUPPLY CO.

Charge to Cash Sale.

Frank Lamb.

Farm ———. Well No.———. Order No. ———.

Ordered by Frank F. Lamb. Received by Frank F. Lamb.

Delivered March 12, 1919.

Sold by Paul Thieman. Shipped via Called for.

Always show name of salesman.

	List.	Gross.	Dis.	Net.
1-set 8¼-28# Double Imp. under Reamer Cutters.	7480		02	73.30

#L 67—#L 43.

Paid, 3 12-18.

[Notarial Seal] PAUL THIEMAN.

Material Checked Out by P. T. Priced by ———.
Checked by ———. Extensions O. K. ———.
C. O. D. No. ———. No. of Sales Report ———.
Date of Sales Report ———. [32]

Form No. 147. 5M. 9–18.

THE CONTINENTAL SUPPLY COMPANY.
Tulsa, Okla.
Order No. 35,326.

From

UNION TOOL CO.,

Manufacturers of

Oil Well Drilling Tools, Heavy Forgings, Fishing Tools, Bits and Jars a Specialty.

West Chicago, Ill., U. S. A.

(Endorsed on back:)
L–43) AA
)
L–46)
)
Inspector J. R. R. [33]

with wire through same L
Dennisons L Cloth)
Plaintiff's Exhibit "F"

Associated Oil Co.
Casmalia,
Calif.,

From

UNITED TOOL CO.,

Manufacturers of

Oil Well Drilling Tools, Gas and Steam Engines, Fishing Tools, Bits and Jars a Specialty.

Torrance, Calif.

(Hole for fasting tag)
International Tag Co—Chicago.
Exhibit B.

(Endorsed on back of tag:)

Associated
Oil Co.

8432

8¼

Casmania

April 14th -19

R. P. FOX. [34]

Associated Oil Co.
Casmalia,

Calif.,

From

UNION TOOL CO.,

Manufacturers of

Oil well drilling tools, gas and steam engines.
Fishing Tools, Bits and Jars a Specialty.

Torrance, Calif.

(Hole for fasting tag)
International Tag Co—Chicago.

(Endorsed on back of tag:)

8481

8¼

Exhibit B.

April 14th, '19. Associated Oil Co., Casmania.
R. P. FOX. [35]

Form 803-A. Standard 3-18-50000

COPY OF FREIGHT BILL.

Casmania.

Station April 8, 1919.

Freight)
Bill No.)

Consignee, A. O. Co.
Destination

Route

(Point of Origin to Destination)

To SOUTHERN PACIFIC COMPANY, Dr., For Charges on Articles Transported:

Waybilled from	Waybill Date and No.	Full Names of Shipper.	Car Initials and No.
Los Angeles	4/4–1493.	Union Tool Co.	So. 254694.
Point and Date of Shipment.	Connecting Line Reference.	Previous Waybill References.	Original Car, Initials and No.

Number of Packages, Articles and Marks.	Weight.	Rate.	Freight.
(2) Underreamer Bodies	480	40	336
(2) Drill Bits COPY.	420	49	206
	4–9–19		

Advances	Total.
To Collect.....	559
Prepaid	17
Total Collected by Agent	542

Make Checks Payable to the Company.

Delivered to
M. P. E.

A. L. Smith, Consignee,

Subject to storage or demurrage Charges in Accordance with Published Tariffs.

[Endorsed on back:]

Copied by R. P. Fox from original bill at Casmania and witnessed by M. P. Ellis—freight clerk April 14, 19.

R. P. FOX.

Exhibit B.

[36]

Fullerton Oil Co.

RECEIVED
R. C. F.
FEB. 6, 1919.

Brea

Calif.

SALES DEPT.
Ansd.

From

UNITED TOOL CO.

Maufacturers of

OIL WELL DRILLING TOOLS, GAS AND STEAM ENGINES, FISHING TOOLS, BITS AND JARS A SPECIALTY.
TORRANCE, CALIF.

(Hole for fasting tag) International Tag Co—Chicago.

Exhibit C.

(Endorsed on back of tag)
Feb. 5th, 1919, 2 P. M.

This tag was taken by the undersigned from a 15½" Double Underreamer cutter.

R. P. FOX. [37]

Affidavit of G. A. Montgomery, Dated April 21, 1919.

County of Ventura,
State of California,—ss.

Now comes Gustavus A. Montgomery, a resident of the City of Santa Paula, County of Ventura, State of California, and being duly sworn according to law, deposes and says:

That he is employed by W. J. Sheehan as foreman

of the W. J. Sheehan Oil Tool Machine Company's machine-shop at Santa Paula, Ventura County, California, and has been so employed at all times since November, 1917.

That on January 15th, 1919, one Richard Smith, who represented himself to the deponent as the superintendent of the Union Tool Company's manufacturing plant at Torrance, county of Los Angeles, State of California, came to the deponent at Santa Paula and said Smith brought with him one Double Underreamer body, size about 6¼ inches, and directed that certain machine work be done upon said Underreamer body in order to adapt it to a form and type of cutters differing from the form and type of cutters heretofore used with this particular style of Underreamer body.

Deponent states that he is familiar with well-drilling underreamers, and has himself invented and patented improvements in these devices. That he understands the underreamers manufactured by the Union Tool Company aforesaid, under the Double patents, and that the underreamer body above referred to was what is known as a "Pocket Type Underreamer," which is precisely the same as the well-known "Double Improved" Type, excepting that it has small fillets left in the outer ends of the notches which accommodate the upper shoulders of the cutter heads.

That the aforesaid Richard Smith directed the deponent to plane two grooves about 1⅝ inches apart in each of the opposite parallel bearing faces of the hollow, slotted extension of the said reamer

body. Each of these grooves was about 4¾ inches long by ⅜ inches wide and was cut so the bottom was downwardly and inwardly inclined. The grooves [38] were planed out close to the sides of the parallel bearing faces upon which the cutters rest when in expanded position.

The cutters for this reamer body, when same has been altered as above described, are the same as the cutters heretofore used in the "Double Improved Underreamer" body excepting that the notch in the back of the cutter is not carried clear across the cutter shank, but is limited by walls flush with the a notch but is rather a rectangular pocket, or box-like recess in the back of the cutter shank. The grooves which were cut in the reamer body, as above set forth, are intended to accommodate the side walls of this pocket or recess when the cutters are in collapsed position.

When this alteration was completed by the deponent the said Richard Smith directed that the bill for deponent's labor be sent to the Union Tool Company at Torrance, County of Los Angeles, State of California, and a copy of said bill is attached hereto. Said Richard Smith then departed with the reamer body, so altered, remarking that he would deliver the same to the Willard Lease, about six miles south of the town of Santa Paula, County of Ventura, State of California.

IN WITNESS WHEREOF the deponent has hereto set his hand and seal this 21st day of April, 1919.

GUSTAVUS A. MONTGOMERY.

Subscribed and sworn to before me this 21st day of April, 1919.

[Seal] ALMA B. WIGHT,

Notary Public in and for the County of Ventura, State of California.

My commission expires Dec. 22, 1920. [39]

W. J. SHEEHAN OIL TOOL MACHINE CO.

ORDER NO. 38.

Santa Paula, Cal.

Jan. 15, 1919.

Sold to Union Oil Tool Co., Torrance.

Bill

Ship to Torrance, Calif.

THEIR ORDER No. R. Smith,

At——— Via———

DESCRIPTION:	LABOR. Date.	Workman.	Hrs.	Rate.	Amount.
Cutting clearance for Improved underreamer, and making other minor fittings.	1/15	Mont.	3		6.00
This repair on new Double underreamer, ... (20y)....					
MATERIAL:					

Total Labor.....	
Add Material	
Freight, Cartage, etc.	
Total	6.00
Total	

Copy. [40]

TIME SHEET.

———, 191—.

W. J. SHEEHAN,
Coalinga, Cal.

Name ———.

No. Hours.	Description of Work.	Order No.	Material Used.

Made
Copy/by Warenton
4/12/19,

WARENTON.

In presence of Fox and
Montgomery.

(Endorsed on back:)

No. 38. Jan. 15, 1919.

Sold to Union Oil Tool Co., Torrance. Their Order No.

R. Smith.

Due
Ship to Torrance, Cal.

Description:
Cutting clearance for Improved Underreamer and making other minor fittings.

	hrs.	
1/15–Mont–3		6 00
Total..		...6 00

[41]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. A.-4—B.-62, Consolidated.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Affidavit of Reg. P. Fox, Dated April 5, 1919.

Now comes Reg. P. Fox, a resident of Santa Monica, county of Los Angeles, State of California, and being duly sworn according to law deposes and says:

That he is employed as a salesman by the Wilson & Willard Manufacturing Company, and whose principal place of business is located at 2301 East Vernon Avenue, city of Vernon, County of Los Angeles, State of California.

That his employment requires him to frequently visit the several oil fields of Southern California for the purpose of informing himself at all times of the numbers and types of well-drilling devices used in said oil fields.

That he is familiar with the construction and use of well drilling underreamers and particularly those manufactured by the Wilson & Willard Manufacturing Company, under the Wilson patent, and those manufactured by the Union Tool Company,

under the Double patent, at Torrance, County of Los Angeles, State of California.

That since November 6th, 1918, he has seen numerous newly manufactured Double Underreamers and parts therefor in said oil fields, and constantly sees new Double Underreamers and repair and spare parts therefor arriving in said fields and bearing shipping tags from the Union Tool Company's plant aforesaid.

That many of these underreamers and parts therefor are of the style published and advertised for sale by the said Union Tool Company as the "Pocket Type Double Underreamer," which said Pocket Type Double Underreamer differs in no [42] respect from the Double Improved Underreamer excepting that small triangular fillets of metal are left at the sides of the lower end of the hollow slotted extension as shown in the photograph attached hereto and marked Exhibit "A." Said photograph was taken by deponent on or about April 11th, 1919, in the machine-shop of the Montebello Oil Company near Fillmore, County of Ventura, State of California, and shows a Pocket Type Double Underreamer, No. 8303, size ten inch.

That these fillets of metal do not change in any manner whatsoever the mode of operation of the underreamer nor differentiate it in any manner or degree from the Double Improved Underreamer. Also the several parts of said Pocket Type Double Underreamer such as the cutter, rod, spring, and key are identical with and are used interchangeably with the similar parts of the Double Improved Underreamer.

That the cutters furnished by the said Union Tool Company and purporting to be for use only with this so-called "Pocket Type Double Underreamer" are being shipped into the several oil fields of Southern California in large numbers from the Union Tool Company's plant aforesaid, and that these cutters usually bear a small paper label pasted thereon and containing the printed inscription "Made for Pocket Type Reamer."

Deponent knows of numerous sales and deliveries by the Union Tool Company aforesaid, of the so-called Pocket Type Double Underreamers to various operators in the California oil fields since November 6th, 1918, and as a specific instance of such sale and delivery of these devices will say that: On or about April 14th, 1919, the deponent visited the properties of the Associated Oil Company at Casmalia, County of Santa Barbara, State of California, and therein saw two size eight and one-fourth inch Pocket Type Double Underreamers No. 8432 and No. 8481, together with several sets of cutters for same, said cutters differing in no wise from the [43] cutters used in the Double Improved Underreamer. These cutters bore labels announcing that said cutters were intended for use in the Pocket Type Reamer. These underreamers had been shipped by the Union Tool Company from Los Angeles on April 4th, 1919, in car No. S. O. 254,694, and were received by the Associated Oil Company on or about April 9th, 1919. A copy of the freight bill was made by the deponent in the presence of M. P. Ellis, the freight clerk for the Southern Pa-

cific Company at Casmalia, aforesaid, on April 14th, 1919, and is attached hereto and marked Exhibit "B." The shipping tags were removed from the two above-described underreamers and are attached hereto as part of Exhibit "B." These underreamers were photographed by the deponent and copies of said photographs are attached hereto as part of Exhibit "B."

That the Union Tool Company aforesaid is delivering to operators in the several oil fields underreamer cutters for the type of underreamers known as the Double Improved Underreamers, namely: On or about February 4th, 1919, the deponent saw on the property of the Fullerton Oil Company, at Brea, County of Orange, State of California, a pair of Double Improved Underreamer cutters size about fifteen and one-half inch which had just arrived on said property. One of the shipping tags was removed from these cutters by deponent and is attached hereto and marked Exhibit "C." Also a photograph taken by deponent is attached hereto as a part of Exhibit "C," and which shows one of the Double Improved Cutters aforesaid.

That the Union Tool Company aforesaid, is manufacturing, advertising and offering for sale and selling still another so-called type of underreamer which said Company designates as its "Type U Double Underreamer," namely: On or about April 9th, 1919, deponent saw at Well No. 7, on the property of the Columbia Oil Company at Brea, county of Orange, State of California, one size and one-quarter inch so-called Double Underreamer No. 8338, stamped

with the letters [44] "U. T. Co.," and accompanied by two sets of cutters. The drillers at this well informed the deponent that the underreamer and cutters had been shipped to said property only four or five days prior to deponent's visit. The deponent photographed this underreamer and cutters, and copies of said photographs are attached hereto and marked Exhibit "D." This underreamer is the same as the so-called "Pocket Type Double Underreamer" excepting for slight changes which are colorable only and obviously intended to cause it to appear different from the Double Improved Underreamer. These changes consist of walls left in the backs of the cutters at the sides of the notch and flush with the sides of the cutter shanks so as to transform the notch into a rectangular box-like recess. The body is the same as that of the Pocket Type Double Underreamer excepting that it has two grooves planed into each of the opposite parallel bearing faces to accommodate the aforesaid walls of the sides of the notch in the cutter. The Double Improved Cutter can be used in this so-called Type U Body and Double Improved Bodies can be and are being readily altered to accommodate these Type U Cutters. Likewise these Type U Cutters can readily be altered by any tool-dresser or blacksmith so as to be used in the Double Improved Underreamer Body.

That on or about April 16th, 1919, the said Union Tool Company, through its agent, the Paul N. Boggs Company at Coalinga, County of Fresno, State of California, furnished the deponent one of its cata-

logs of spare parts of Double Underreamers and said catalog is attached hereto and marked Exhibit "E." This catalog is intended to promote the sale of extra and spare parts of the Union Tool Company's several underreamers, illustrates and gives the names and the numbers of the several parts or elements of the "Improved," "Type 'D,'" and "Type 'F'" styles of Double Underreamers as well as "Type 'C,'" "Type 'G,'" and "Type 'H,'" of said Union
[45] Tool Company's underreaming devices.

That on or about April 16th, 1919, said Union Tool Company, through its agent, the Paul N. Boggs Company aforesaid, furnished the deponent one of its catalogs describing the "Type U Double Underreamer" and said catalog is attached hereto and marked Exhibit "F." The illustrations in this catalog do not faithfully depict the several examples of this Type U Double Underreamer observed by the deponent in the oil fields, in that it shows the cutters as bearing only on that portion of the hollow slotted extension which lies between the two grooves therein, whereas the devices examined by the deponent in the oil fields have also bearings for the cutter heads on the outside of said slots. This is illustrated in the two photographs attached hereto and marked Exhibit "G," one of which shows Union Tool Company's Reamer No. 260, size six and one-quarter inches and which photograph was taken by deponent on or about April 20th, 1919, on the property of Oak Ridge Oil Company near Santa Paula, County of Ventura, State of California, where said reamer had recently been delivered; and the other photograph shows the

Union Tool Company's Reamer No. 8473, size eight and one-quarter inches and which photograph was taken by deponent on or about April 15th, 1919, at the warehouse of the Paul N. Boggs Company, at Coalinga, Fresno County, State of California.

REG. P. FOX.

Subscribed and sworn to before me this twenty-fifth day of April, 1919.

[Seal] MILDRED LEACH,
Notary Public in and for said Los Angeles County, State of California. **[46]**

[Endorsed]: In the United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—No. A.–4—B.–62, Consolidated. **[47]**

United States District Court, Southern District of California, Southern Division.

A.–4–B.–62, Consolidated.

E. C. WILSON,

Plaintiff,

vs.

UNION TOOL COMPANY, a Corporation,

Defendant.

Affidavit of E. C. Wilson, Dated March 13, 1919.

State of Oklahoma,
Tulsa County,—ss.

E. C. Wilson, being duly sworn and upon oath, deposes and says:

My name is E. C. Wilson, a resident of Los Angeles, California, and am president of the Wilson & Willard Manufacturing Company, and the plaintiff in the above-entitled action.

That on Friday, March 8th, 1919, I visited the store of the Continental Supply Company, of Tulsa, Oklahoma, and saw a large quantity of underreamer cutters for Double Improved Underreamers, and which cutters were on the first floor of the Continental Supply Company's store. I made a careful estimate of the quantity and found that there were approximately 136 underreamer cutters for 8¼-Double Improved Underreamers about 36 for 6–5/8" Double Improved underreamers, and a small quantity for what seemed to be 5–3/16" cutters for Double Improved Underreamers. A considerable quantity of the above-stated cutters bore shipping tags, one of which I removed from an 8¼" cutter. This tag is attached to this affidavit and made a part thereof, marked Exhibit "A." It bears the words in black ink, "From Union Tool Co. Manufacturers of Oil Well-Drilling Tools, Heavy Forgings, Fishing Tools. Bits and Jars a Specialty. West Chicago, Ill. U. S. A." The tag also bears the words, stamped in red ink, "The Continental Supply Company, Tulsa, [48] Oklahoma." The tag also bears the words and figures, "Order No. 35,326." I was informed by one of the employees of the Continental Supply Company at that time, and while in their store, that they were selling a large quantity of underreamer cutters of that type; that within the last two months they had

received and sold more than twice the quantity then on the floor.

I was informed by another of their employees that they had been informed by the Union Tool Company that the Double Improved Underreamer was not effected by the injunction issued by the Circuit Court in the above-entitled case, and that furthermore, they had been selling the Double Improved Underreamers and extra parts for same with that understanding. He stated they could not understand our position in the matter and our contentions that that type of underreamer was under the injunction in view of the assurances they had had from the Union Tool Company.

I also visited the store of the Oklahoma Tool & Supply Company, and learned they were receiving from the Union Tool Company, of Chicago, Double Improved Underreamers and extra part for same, and selling them upon the same assurances from the Union Tool Company. Furthermore, one of the officers of the Oklahoma Tool & Supply Company informed me that the Union Tool Company had assured his company that they would protect his company from any damages or losses, which might result from any litigation in the matter.

I was also assured by one of the officers of the Oil Well Supply Company, located in Tulsa, that at one time the Cosden Oil Company had expected to order a considerable quantity of Wilson underreamers from them, as they expected to be unable to procure any of the Double Improved Underreamers, or extra cutters or other parts for underreamers of that type,

but that he later learned that the said Cosden Oil Company had found it an easy matter to procure the said Double Improved Underreamers and extra parts for same, even after the general announcement had been made through the newspapers [49] and by circular letter that that type of double underreamer was covered by the injunction and was to be suppressed.

In company with Frank F. Lamb, I visited the store of the Oklahoma Tool & Supply Company, on the morning of March 12th, 1919, and there pointed out to him a 5 3/16" Double Improved Underreamer, and which underreamer bore a number stamped thereon, 9109, and instructed him to purchase that underreamer, securing receipted invoices for same; same to be shipped by express to the Wilson & Willard Mfg. Company, Los Angeles, California. This underreamer was selected for the reason that I was informed by the employees of the Oklahoma Tool & Supply Company that it had been received from the Union Tool Company, of Chicago, on February 21st, 1919. At the time we inspected this underreamer, it bore a Union Tool Company's shipping tag, having the consignee's name, viz.: The Oklahoma Tool & Supply Company stamped in red ink thereon; on the back of the tag was stamped the words, Received 2–21.

When this underreamer was delivered to the Nichols Transfer Company preparatory to crating and shipping, that tag had been torn off, leaving only the eye of the tag attached to the underreamer. The said underreamer, and underreamer cutters, were

boxed and also tagged, said tags identifying the underreamer as Plaintiff's Exhibit "A" and the cutters as Plaintiff's Exhibit "B–1" and Plaintiff's Exhibit "B–2."

While in Tulsa, I have been asked repeatedly by various oil well supply men, and oil well operators how it is that the Double Improved Underreamers and cutters for same are being sold with impunity by the supply companies, and evidently in defiance of the injunction.

E. C. WILSON.

Subscribed and sworn to before me, this 13th day of March, 1919.

[Seal] BEULAH A. HULL,
Notary Public.

My commission expires 3/27/1922. [50]

Exhibit "A."

Form No. 147 5–M 9–18.

THE CONTINENTAL SUPPLY COMPANY,
Tulsa, Okla.

Order No. 35,326.

From

UNION TOOL CO.

Manufacturers of

Oil Well Drilling Tools, Heavy Forgings, Fishing Tools, Bits and Jars a Specialty.
West Chicago, Ill., U. S. A.

(Hole in tag for fastening with wire attached.)
Exhibit "A." [51]

State of California,
County of Los Angeles,—ss.

Jennie Shutt, being duly sworn, according to law, says: That she is a citizen of the United States, and upwards of the age of twenty-one years, and employed in the office of Raymond Ives Blakeslee, one of the solicitors for complain*tiff* in the suit mentioned in the foregoing annexed papers; that on the 28th day of April, 1919, she served a true and exact copy of each of the foregoing annexed affidavits, motion and order, minus, however, the annexed paper exhibits referred to in such affidavits, upon Frederick S. Lyon, solicitor for defendant, at the office of said Lyon, Merchants Trust Building, Los Angeles, California, by delivering such copies of said papers to said Lyon personally, at the same time exhibiting to him the foregoing original annexed papers and attached exhibits.

JENNIE SHUTT.

Subscribed and sworn to before me this 28th day of April, 1919.

[Seal] MILDRED LEACH,
Notary Public in and for the County of Los Angeles, State of California. [52]

[Endorsed]: In Equity. No. A.-4—B.-62, Consol. In the United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Co., Defendant. Motion, Order, Affidavits, etc. Filed Apr. 28, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Received copies of the within affi-

davits, motion and order minus all exhibits marked this 28th day of April, 1919. ————, Solicitor for defendant. Raymond Ives Blakeslee, 727–30 California Building, Los Angeles, Cal. George Benton Wilson, Solicitor for complainant. [53]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. A.–4—B.–62, Consolidated.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Stipulation as to Facts.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the defendant herein admits and the complainant is therefore relieved from proving the following allegations of the complainant in his petition and the affidavits attached thereto in support of his motion praying for an order of this Court citing the defendant to show cause why it should not be punished for contempt because of its alleged violation of the injunction issued in this cause on November 6, 1918:

I.

That the defendant herein, both before and since

the service of the injunction in this cause on November 14, 1918, has manufactured and sold numerous of, and intends, unless otherwise ordered by this Court, to continue to manufacture and sell its underreamer known by it and advertised to the trade as the "Double Pocket Type" underreamer, together with extra, spare, and repair parts therefor; and the parties hereto through their respective counsel, have selected one of said "Double Pocket Type" underreamers to be submitted to this court as Exhibit "A" as exemplifying said "Pocket Type" underreamer. [54]

II.

That the defendant herein, since the service of the injunction in this cause on November 14, 1918, has manufactured and sold, and intends, unless otherwise ordered by this Court, to continue to manufacture and sell its underreamer known by it and advertised to the trade as the "Double Type U" underreamer, together with extra and repair parts therefor; and the parties hereto, through their respective counsel, have selected as an illustration of said "Double Type U" underreamer either the wooden model to be marked Exhibit "B," or a "Double Type U" underreamer embodying the actual construction, except as made in metal embodied in said wooden model, same to be marked Exhibit "B."

III.

That the defendant herein, since the service of the injunction in this cause on November 14, 1918, has manufactured and sold, and intends, unless otherwise ordered by this Court, to continue to manufacture

and sell cutters, springs, spring rods, keys, cotterpins, and all parts except bodies, as "extra" or repair parts for and to be used with the underreamers particularly referred to and described in the Interlocutory Decree and injunction aforesaid in this cause (excepting Type F reamers) and which were sold by the defendant to dealers and users prior to the service of said injunction.

Nothing in this stipulation shall be construed as limiting the right of either party to submit testimony at such hearing as to any other or additional material facts and such testimony shall be taken either orally in open court or by deposition with the adverse party afforded an opportunity to cross-examine.

GEORGE BENTON WILSON,
Solicitor for Complainant.
FREDERICK S. LYON,
Solicitor for Defendant. **[55]**

[Endorsed]: No. A.-4 and B.-62—Eq. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Co., Defendant. Stipulation as to Facts. Filed Jul. 23, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. **[56]**

In the District Court of the United States for the Southern District of California, Southern Division.

Hon. BENJAMIN F. BLEDSOE, Judge Presiding.

A.–4—B.–62, Consolidated.

ELIHU E. WILSON,

Plaintiff,

vs.

UNION TOOL COMPANY,

Defendant.

Oral Opinion of the Court.

APPEARANCES:

GEORGE B. WILSON, Esq., and RAYMOND I. BLAKESLEE, Esq., for Plaintiff.

FREDERICK S. LYON, Esq., and A. V. ANDREWS, Esq., for Defendant.

Los Angeles, California, July 30, 1919. [57]

Los Angeles, California, Wednesday, July 29, 1919, 10 A. M.

The COURT.—In the matter of Wilson against the Union Tool Company, in contempt, I advised counsel for the defendant and respondent over a telephone that I had come to the conclusion that the proffered matter sent to and thereafter emanating from the Patent Office with respect to an application for patent made by the respondent Double, was probably admissible upon at least one phase of the case, and requested counsel to provide me with the matter

which they offered the other day, so that I could give it consideration, and at the opening of court I would vacate the order heretofore made and permit the matter to be filed as part of the proceedings in evidence, as a part of the showing made by the respondent. Have you examined it, Mr. Wilson?

Mr. WILSON.—I have not examined it, no.

The COURT.—I have examined it (hands paper to Mr. Wilson for examination), and given consideration to the matters that are set forth therein. My conclusion is that it is relevant to the extent that it may have the effect of showing the good faith or want of wilfulness on the part of the defendant. I am still persuaded that it has no effect as being a conclusive or binding adjudication upon this Court with respect to the terms and efficacy of the injunction. It will be admitted and marked as an exhibit.

(The paper referred to is marked Defendant's Exhibit "XX.")

I have given this case all of the consideration that has been available to me, even at the expense of burning some midnight oil, since the matter was submitted, taking it up immediately, partly because of pressure of other matters that required my early attention, and partly because of the character of the proceeding here and of the importance of a determination so that the rights of the parties may become fixed, in so far as they may be fixed by an expression of [58] opinion and a determination of this Court.

The litigation between these parties met me at the inception of my incumbency on this bench, and it

has been here ever since, and promises to be left as a heritage to my heirs, from the way the matter seems to be developed from time to time; and I want to put as much of it behind me as possible, as the same may arise, in order that there may be some degree of peace and quiet thereby encouraged as between these litigants, so that the community may be less disturbed by their very tedious and prolonged litigation. Seemingly if they cannot litigate about one thing they will about another.

Now, this proceeding comes up on an assertion on the part of the successful litigation, that the defendant has violated the injunctive order of this Court. At the very inception of the consideration of the case we are caused to inquire, What did this Court enjoin? And that is answered in no uncertain way by the terms of the injunction order, which has all the force and efficiency that a final, affirmed, unreversed, and, indeed, uncertioraried order of this Court of the United States possibly could have.

The defendant, Union Tool Company, was enjoined from manufacturing or using, leasing or selling or causing any of those various things to be done, any underreamer or underreamer like—that is, similar to or the equivalent of, or, carrying on the language of the injunction, "or embodying the construction of inter-relation or formation of parts of either the Double Improved or Type 'D,' or Type 'E,' or Type 'F' reamer manufactured by the defendant; and from manufacturing or causing to be manufactured, selling or causing to be sold, using or causing to be used, leasing or causing to be leased, any part or

parts or elements calculated and intended to be combined or used as a part or feature of any [59] underreamer or device in infringement of Letters Patent No. 827,595, that is, of claims 9 and 19 thereof, in any manner whatsoever, or from manufacturing or causing to be manufactured, using or causing to be used, selling or leasing or causing to be sold or leased, either directly or indirectly, any combination of parts or elements or features capable of being assembled together or used in infringement of said letters patent No. 827,595, that is, if claims 9 and 19 thereof."

Now, the proofs adduced upon the hearing, together with the stipulation of counsel introduced in evidence, or made a part of the record, rather, with respect to the occurrences of the past since the service of the order of the injunction—and this injunction was served on the defendant, Union Tool Company, by leaving a copy with Edward Double, president, on the 14th day of November, 1918—show that the defendant has manufactured and sold spare parts, that is, repair parts, to be used in connection with and in furtherance of the utility of reamers admittingly within the terms of the injunction, but sold by it previous to the issuance or service of the injunction. And in addition, the proofs show that the defendant has sold, from time to time, whenever and wherever it could, apparently, its self-styled Double pocket type and its other self-styled Type "U" underreamers. The defense urged upon this hearing is that neither the manufacture nor the sale of the so-called pocket type is a violation of the in-

junctive order, and that the same is true of the so-called "U" type.

This injunction, as we all know, is the result of litigation long pending here in this court, in which an injunctive decree, or interlocutory decree, was first issued by Judge [60] Cushman, of the Western District of Washington, sitting here upon assignment, from which an appeal was taken by the defendant, the Union Tool Company, and upon which appeal and in consequence thereof, the decree of Judge Cushman was affimed. Thereafter, a petition for a rehearing was filed before the Circuit Court of Appeals, which had rendered the affirmance, and which petition was in due course denied, without the filing of any additional opinion, so far as I am able to gather from the record; and thereafter a writ of certiorari was sought in the Supreme Court of the United States upon the entire record, which writ was denied; and thereupon this particular injunction, in virtue of the interlocutory decree thus affirmed, was issued.

I am constrained to agree with counsel for the defendant, as expressed in their petition, or argument, rather, before the Supreme Court of the United States for a writ of certiorari, to the effect that the reasons for the issuance of the injunction are largely to be determined by what Judge Cushman said in his decree. There is a long opinion written by the Circuit Court of Appeals which touches at great length upon the construction and infringement of the Type "F," but it does not indulge at any great length upon the construction or rationale of the in-

fringement of the other types of defendant. But, be that as it may, the Circuit Court of Appeals affirmed the decision and the holding—the conclusion, and therefore, presumably the reason—because it did not dissent—of Judge Cushman, and therefore, I feel that this Court may with propriety follow the reasoning and the logic of Judge Cushman, as the same is announced in his first and then in his subsequent opinion upon the rehearing. And in that opinion, reading from the record in the Circuit Court of Appeals, No. 2918, being the record of this case on appeal, at page 65 et seq., it is noted, first, that after referring to the Double patent involved in companion suit No. 1540, which was decided by Judge Cushman adversely to the **[61]** complainant in this case, but which determination was reversed upon appeal, calling attention to the patent involved there and the patent involved in this case, being No. 827,595, Judge Cushman, at the very outset of his opinion almost, says:

> "Departures by the defendant from the structure, as described in the Double patent, it is complained by the complainant, infringe the patent in suit."

So that we have the suggestion from the very beginning that the complaint of the plaintiff here was not because the Double people were making an instrumentality in similitude or at all like the device, which was the subject of their own patent, but that they had departed therefrom. That must be kept in mind, because that is the thread that runs through the entire claim of the defendant, and the thread

which finally weaves into the fabric which resulted in this injunction.

Judge Cushman then describes somewhat in detail the Wilson invention, as illustrated and limited by claims 9 and 19, and he says, on page 76:

> "Passing to claims 9 and 19, it has already been found that, as ways for the cutter to slide or ride on, the facts of the prongs and lugs were no more than equivalents of the ways found in the Double invention; but, in so far as these prongs or lug-faces afforded bearings for the cutter when in reaming position is concerned, a different question is presented, and this is the feature covered by claims 9 and 19."

And that "different question" which is presented, is the question in the case upon which the decision hinges, and the question involved in this litigation at the present time.

He goes on, on page 78—reading only those things which seem to me to be both illuminating and persuasive with respect to the precise point that is now before the Court:

> "In so far as these bearings in defendant's 'Double Improved' and Type 'F' extend upon the faces of the lug or lugs beyond the sides of the diameter of the pocket in which the cutter is mounted, they are mechanical equivalents of the bearing on the outer face of the lugs in the patent in suit, and the same is true of the widened portion of the inner surface of the cutter adapted to bear upon such portion of the face of the lug. It matters not that, in the device

shown in evidence, the cutter head extends but a little distance upon this **[62]** bearing, for to that extent, defendant has appropriated what does not belong to it and, therefore, infringes."

He himself indicates that the mere question of inches or fraction of inches is not a determining or controlling factor in the case at all. Of course, if the extension upon the new bearing surfaces was so slight in amount as to be negligible, and as not to afford any inthrust bearing on the face of the cutter itself, then, of course there would be no appropriation of the property of the plaintiff; but to the extent, as he indicates, however little the distance might be, so long as it was a distance suitable to and actually used for the purpose of an inthrust bearing upon the head of the cutter, as contradistinguished from an inthrust bearing solely upon the shank of the cutter, to that extent, in line with his decision, there would be trespass and infringement.

He also proceeds, upon the same page:

"If cutting away the interposed web in the Double device to allow the cutters to collapse more completely was patentable, on the same principle, cutting away the side web to give the cutter yet a greater bearing was also patentable and, if appropriated, infringement results."

He then proceeds, on the same page:

"In the earlier Double devices there were secondary dovetails adjacent to the junction of the cutterhead and shanks, with corresponding ways in the inner faces of the extension, forming

the recess in which the cutter is mounted on the body."

And that phrase, "mounted on the body," occurs elsewhere in the opinion and should not be overlooked. I think it forms a distinctive feature which should be kept in mind, and refers to the position of the reamer by which it is secured in place in the recess, and has no reference at all to the position of the reamer when it is actually in operation, in so far as those two different situations may be thus differentiated and distinguished.

> "These added ways caused an outward flare at the mouth of the recess, or pocket. As these ways were made deeper and the flare increased, a wider bearing would be given an opportunity for a wider faced cutter to bear upon it; **[63]**

So far, so good.

> "but when defendant departed from this form of construction and entirely sheared away the side web of the extension to form a lug, the bearing faces to accommodate the wider cutterhead, he appropriated the invention and conception of Wilson, and particularly of the patent in suit."

Now, the gist of the entire argument of the defendant as made here in court, and as reduced to writing and furnished to the court thereafter by two different installments, is that there must be an *entire* shearing away of the side web of the extension, in order—under the terms of the decision and within the limits of the reasoning of Judge Cushman—that there should be infringement, and therefore, violation of this injunction; but they misconceived, with-

out question, the character and kind and sort of shearing away that is referred to. It was not a lateral shearing, in one sense; it was a vertical shearing. It had reference to any shearing which took from the top of the available lug the material that had been superimposed upon it before, with the inevitable and natural and mechanical result of thereby affording a new inthrust bearing; and it never was intended, and that is shown by the conduct and the argument of the defendant all through, that the more complete lateral shearing away of the web was the thing that was referred to by Judge Cushman when he said "entirely sheared away." It was the shearing away entirely of such portion on either side as would afford a new inthrust bearing.

> "The fact that defendant did not appropriate the, perhaps, relatively more important conception of Wilson, whereby the cutter shanks were allowed to collapse between the prongs, does excuse it, or take from the infringement it has practiced, for the seat or bearing of the cutter-head on these faces, or lugs, is not dependent upon the swing in collapse of the cutter-shanks between the prongs."

Therefore it was held that the machine of the defendant infringes claims 9 and 19.

Now, I am frank to say, I have not had the opportunity to read all of this record that went to the Circuit Court of Appeals, and upon which this application is based and heard, **[64]** some of which is very, very interesting, but I have read a good portion of it, and I may say that as I am at present minded,

with only this limited and qualified knowledge of all of the facts that were adduced for the consideration of the Court, I am rather inclined to think that I would have found some difficulty myself in coming to a conclusion that the structure of the defendant read upon the claims 9 or 19 of the plaintiff in that that structure, except in virtue of a very broad, liberal and helpful construction, does not approach the prong structure that is an essential part of the combination of the plaintiff, as the same is described in its claims. Both claims, 9 and 19, using the language:

> "9: An underreamer body terminating in prongs forming a fork; and, 19: an underreamer comprising a body terminating in two prongs."

I say, with my limited knowledge of the situation and of all of the matters involved, and of the prior art, it seemingly would have been difficult for me to have read the structure of the defendant upon those two claims of the patent; but Judge Cushman, in his opinion on rehearing, evidently considered that matter, because he says:

> "Counsel for defendant has again urged upon the Court consideration of the merits. The forked formation of complainant's reamer body was essential to the complete collapse of the cutters; but it was not essential to the coaction in the particular in which infringement is found. The fact that, in describing, in the claims, a member of a machine which performs two functions in such a way as to disclose a feature of its fitness

to perform one function, which feature is not essential to the discharge of its other function, does not warrant competitors in dropping such feature and thereby appropriate one-half of the invention and its advantage, nor prevent the Court from according the patentee such a range of equivalents as will fairly protect him in the substantial merits of his invention. If so, form becomes everything and substance nothing."

Now, that paragraph, to me, is very illuminating, and discloses the reason, as I sense, for the reading of the defendant's device upon the two named claims of the plaintiff's patent. The Court thereby gave, as indicated, a broad construction, and therefore, a broad range of equivalents [65] to the real merit and improving feature of the plaintiff's invention. But whatever might be my views with respect to that, as merely one of the judicial instrumentalities to which this rather complicated litigation has been submitted, whatever my own views might be, whether based upon a limited or a full knowledge of the record, the defendant herein is absolutely foreclosed by all of the proceedings which have been taken against it to the effect that its device—the devices, specifically, and those in similitude thereof, mentioned in the decree—are in actual infringement of the two claims of the patent which were mentioned; and so it is no longer open to it to contend otherwise or to hope that any court will give countenance to its contention.

Now, that being all considered, the next question,

and the practical question involved, is whether or not these devices are in plain, distinguishable, open, apparent similitude to the devices which the Court said the defendant might not use. If there were anything in the position of the defendant that their only invasion of the right of the plaintiff heretofore was the entire shearing away of the lateral web structure on each side of the pocket or recess, why, of course their position here would be impregnable; but, as I have endeavored to show, in my judgment, without any doubt being left in the mind of the Court at all, there is nothing in that contention. There was no suggestion at any time that it was requisite that an entire shearing away of an unused and unnecessary portion of that web should result in infringement of the very substantial, very practical, very helpful and very valuable device that was the result of the conception of Wilson in this case. It was the shearing away of only so much of it, as I have heretofore indicated, as sufficed to provide a new and different and lower inthrust bearing, which gave the strength and stamina to the machine that it required in order to do the work, and in order **[66]** to compete with the device of Wilson, and in order to enable the defendant to stay in the market.

Now, the defendant admits all that, absolutely, and admitted it long before this case was decided by the Circuit Court of Appeals, and admitted it in its brief filed before that Court.

With reference to a drawing to be observed opposite page 22, and with respect to which in the brief

of the respondent in that case there seems to have resulted considerable perturbation of mind; this drawing illustrates a type of reamer containing the primary and secondary dovetails, with the pocket or recess therein, and thereby created, and also containing illustrations of the little fillets of metal removed from the web of the structure and placed one to each side, so that they may be shown to advantage, and which constitute the entire shearing away of the web, to which they have referred, and the doing of which they claim is necessary in order that there shall be an infringement of the claims of the patent, or a violation of this injunction.

They say, on page 23:

> "It is to be noted that this drawing shows two small portions of metal at the outside of the ways 15. These have been identified by the letter A. If these metal portions A are cut away no change is made in the operation of the reamer or in the manner of expansion or collapse of the cutters, nor is the inthrust bearing operatively extended."

And "operatively" is in italics. And therein lies the gist of the whole situation. The bearing would have extended in the sense that two inches of metal are of greater extent than one inch; but there would be no operative extension. The surface, the amount put in use, the amount taken away from the plaintiff, in virtue of his invention and discovery, is not extended, but is used, as theretofore. **[67]**

"The cutters will not bear on such parts remaining from cutting away these parts A. In this connection it is to be noted that none of defendant's reamers have the cutters so laterally extended as to bear on any portion of the body made by cutting away these parts A. Each one of the physical exhibits of defendant's reamers clearly demonstrates this. It is therefore a fact (not controverted or controvertible) that the inthrust bearing A of any of defendant's reamers is not wider than the inthrust bearing formed by this Double patent No. 2 construction and that the removal or presence of these parts of metal A works no change whatever in the reamer. Whether these parts A are present or removed has nothing whatever to do with the alleged tendency of the cutters to rock or twist on the inthrust bearing, so much harped on by complainant, and so thoroughly answered by this Double patent No. 2 and by the Jones removable bowl reamer constructions."

So, "mine enemy has written a book." He has placed himself on record, that the presence or the elimination of these little insignificant pieces of metal does not change the structure at all, and does not affect in even the slightest degree its operative capacity, limit, extent, work or functioning, and had no traceable or tangible result at all; so their presence or absence may be disregarded. He says so himself.

Now, from a consideration of all these things, it is impossible for this Court to arrive at any conclusion at all other than that the pocket type of reamer, and the so-called "U" Type of reamer are obvious and undoubted violations of the deliberate and very definite order of this Court. I can see no escape from the conclusion. I understand that the rule which rests upon this court that on contempt proceedings it will not go into nice and doubtful considerations of law or of fact to determine whether or not a new device which is put out since the announcement and service of the decree, is or is not an infringement. It will leave that to the parties and the due course of the law; but I do understand that where a decree of injunction **[68]** has been rendered, and a party has been told that he cannot do this or that thing, that he may not do that thing by claiming that he is doing something else, which is merely a colorable imitation of the thing that he is forbidden to do. But this, in my judgment, hardly rises to the dignity of a colorable substitution. They themselves say, it is the same thing. It looks the same, is the same.

Now, there has been some talk here about the Jones bowl reamer, whatever that may be, and some argument was presented here with respect to the outer limits of the inthrust bearings approaching the circumference—the outer periphery of the reamer, as was also done before Judge Cushman, and Judge Cushman held, and the Circuit Court of Appeals affirmed it, and the Supreme Court of the United

States has recognized the propriety of that holding and construction, that these Double improved reamers were an infringement of the rights of the plaintiff, in spite of the existence of the Jones bowl reamer, whatever it may have been, and whatever the extent of its discovery may have amounted to. So that is immaterial at this time. It has all been put into the discard, in view of what has taken place.

Now, the other question involved is the question of the spare parts. And I desire to say at the very outset, that my mind is not free from doubt with respect to these spare parts. I am inclined to the belief, from the necessarily rather hasty consideration that I have been able to give that phase of the case—because I took up the other features of the case first, desiring to work them out to my satisfaction before I began the consideration of the question of the spare parts—that after this rather limited opportunity to read the decisions and consider the precedents, and the reason of the thing, that I am not entirely **[69]** satisfied with respect to the situation. It does not appear, in the first place, with any considerable degree of directness, to what extent the defendant has sold these spare parts to middlemen—to other persons, who themselves will sell them and make a profit from them. I am not so sure that that is a material consideration. The law, as I read it, and the reason of the thing, as it appeals to me, seems to be that when the plaintiff, in pursuance of his proper rights shall have received from somebody—it makes no difference who the unfortunate individual is—all of the

profits and all of the damages that shall have inured to him because of the trespass upon his rights, in virtue of an infringement of his patent, why, then he has no further cause for complaint and having done that, he may not go out in the street or upon one's property and take away from him an infringed device merely because it has been, or is, or was, or continues to be, an infringement of his patent. In other words, if he is the beneficiary of all the relief that is usually accorded to one whose rights are violated in a court of law, why, then he has no further claim or complaint to make; and the person or user who is the possessor of such an infringing device thereafter retains and is entitled to exercise proprietary ownership of and over the device, with all of the incidents thereto, it being freed in his hands to the same extent as if he himself had purchased it from one who was a due and regular licensee. And if he is the owner of it and entitled to the beneficial use of it, he is entitled, when a portion of it wears out, to go into the market where best he may, and buy another portion to replace that. He may not do that thing which will result in a reconstruction of the device. He may not, under the guise or similitude of making a repair, absolutely build it over and possess himself from authorized sources of [70] the means of making a new device of an infringing character. He may not do as the story goes of the Irishman,—he had had three or four new handles and several new blades, but still had "the same old knife." He may not do that thing; but he may, as I read the decisions, in virtue

of his proprietary ownership and possession, go into the market and provide himself with necessary repair parts from time to time as the same may be required, in order to fit the device for its intended and practical use. Now, if he possesses the right to do that, then this Court may not directly or indirectly lay its staying hand upon him and say that he may have the form of the thing but is denied the substance; may not say that he has the right to use, but he shall never be permitted the opportunity to use, because the Court will not permit him to buy any of the articles of repair that are necessary for its practical use. And the Court, in effect, would be enjoining him from buying, if it enjoined someone else from selling it to him. I do not see any escape from that conclusion. It would be enjoining the sale to him, if it punished by contempt the sale to him.

Now, it seems to me, upon reason, that the rights of the plaintiff in and to this structure, which are valuable rights and substantial rights, and not to be frittered away by any devices or devious undertakings intended to create business on the parts of this defendant; that those rights, considering the nature of the case which has been brought by the plaintiff, and considering that he has asked in his case, and has secured, a decree entitling him in due course to profits and damages—all profits and all damages that may be properly recoverable by him, that when he shall have been awarded all profits, and more than that, with respect to the matter now particularly before the court, when he shall have [71] been awarded all damages which shall accrue to him,

in virtue of the fact that there has been sold by the defendant a device which it is necessary for the defendant from time to time to repair and rehabilitate in order that it may be put to a successful and practical use—when the plaintiff shall have benefited to this extent by all these things, that he will have no right, neither in law or morals, justice or equity, to claim that he is entitled to any further relief as against mere users of these devices. And I am rather of the belief that this situation of the plaintiff, which appeals to me very strongly—because seemingly, from the slight squint that I have been able in this rather cursory examination to get of the situation here between these parties—seemingly, a great deal of the business and profit of the sale of these underreamers consists in furnishing the repair parts which wear out very frequently, and which are the vital elements of the device in so far as their practical use is concerned. And it appeals to me very strongly that the plaintiff should not be foreclosed or deprived of his rights in the premises, by prohibiting the sale of the mere shell—the body structure—and then permitting forever, as long as the body structure may last, the sale of the repair parts which are so quickly worn away and which are so vitally necessary to the practical efficiency and operating effectiveness of the machine. But plaintiff has made his own bed and he must lie on it. He has asked for damages and for profits, and presumably will get all the damages to which he is entitled. There is no suggestion here that he cannot recover such damages as are awarded to him. The under-

standing that the court has, is that the Union Tool Company is a very rich concern, and it is backed by another very rich concern, if we may pay any attention at all to newspaper talk of the day; and that being true, it is to be presumed now [72] that whatever judgment is recovered will meet with success upon levy of execution; although, for the reasons that I have attempted to give at this time, my mind is not free from doubt with respect to the matter, yet I am constrained to believe that the better reason is one the side of the proposition that in view of the reception of complete relief by way of damages and profits by the plaintiff, in due course, that he is not now entitled to the indirect means of a proceeding in contempt to enjoin users from the practical and effective use of their machines. It might be true that a different rule would apply with respect to sales to middlemen. It might be true; and yet, it is difficult in my own mind to differentiate that situation. The plaintiff is entitled, without doubt, in virtue of his property rights, which are substantial, to possess himself of all of the profits that may be made from the manufacture and sale of this device which belongs to him. And any profits made by a middleman, he would be entitled to retain. But the case as presented, refers but slightly, as I grasp it, to middlemen, and refers mostly to users who have purchased, either directly from the defendant or from some other concern, which concern itself may have been a middle man, but purchased heretofore and prior to the infringement, and the profits arising out of which transac-

tion will be inquired into and awarded in due course, as upon the hearing before a Master and confirmation by the court. So with respect to that feature of the case, I am of the belief that the position of the plaintiff is not well taken upon this application, and that there is no violation of the injunction in the manufacture and sale to users of necessary spare parts of this infringing device, which was sold prior to the issuance of this injunction. The order of the court with respect to that, however, will be that the defendant will be [73] purged of contempt in that particular behalf, without prejudice to a right on the part of the plaintiff to renew its application hereafter, if it shall be so advised.

Now, that disposes of everything save the question of the judgment which the Court shall enter in this case, which has given me no little concern. As indicated heretofore, the litigation between these parties is of long standing. It has been acrimonious at times here in this court, and as is evidenced by the language that is not infrequently found in the briefs on appeal. I am slow to accuse men, whether they be of high or low estate, of bad faith, or of imposition, or of unfair competition, even, or of a seeking to override and overcome through devious and unjustifiable courses the rights of others. I am slow to indulge in such an inference as that, for so to do challenges a man's standing as a member of society; it challenges his disposition to the right and fair thing; it challenges his business, if not his moral and personal integrity, in a way. And I believe it should be the duty of the Court, as it is the duty of

a jury in a criminal case, to await such a determination as that until the evidence that has been presented in support thereof shall convince a reasonable and discriminating mind which is open to fair conclusions, and is not warped or disturbed by any bias or prejudices. And having said all that, I still cannot get rid of the feeling that seems to infiltrate my being after reading a large part of this record, and knowing what has taken place here between these parties, that there has been a sedulous desire and disposition on the part of this defendant to do everything that he could do, and keep out of jail, and yet take advantage of the things that this man Wilson had invented. Now, that seems to be the situation. As indicated by Judge Cushman, it was [74] only because of the departure of the defendant from its own device and the invasion of, and a trespass upon, the device of the plaintiff, that the suit was brought at all. The defendant was not satisfied with its own device; and probably, for the good and sufficient reason that its device, in competition with the plaintiff's device, could not stay in the market. That seems to be the fair sum of it. I know the charges and counter-charges, and statements and denials with respect to who was successful, and who was not, but the good old maxim that the proof of the pudding lies in the chewing of the string, seems to have some slight application here. And if the defendant's device had been entirely satisfactory, and had been the success that seemingly they now wish the Court to believe it to have been, they would not have been in court so many times.

They would have been out there attending to their business selling underreamers and getting the money for them.

This case was thoroughly litigated in this court.

B. F. B. The ~~plaintiff~~ defendant took inconsistent positions, which is adverted to a number of times in the litigation, as between it and the ~~defendant~~ plaintiff—being substantially the same parties all the way through—the ~~plaintiff~~ defendant took inconsistent positions, prosecuting its case under No. 1540 and defending in A.–4 and B.–62, in a manner that seems to challenge its good faith, although it had a legal right to do it. There is no doubt about that. The two cases were thoroughly tried and litigated, rehearing asked for and had, in the sense that another consideration of the case on its merits was given by Judge Cushman; an appeal to the Circuit Court of Appeals; an adverse decision; a rehearing asked for and had, in the sense that no doubt the matters presented were considered; and rehearing denied by that court. And then an appeal, with the aid of new, additional and foreign counsel, [75] to the Supreme Court of the United States, in *certiorari*, where another consideration of its case was had, and all resulting in the affirmance, without frills or furbelows, and without qualifications or restraints at all, of the simple decree of Judge Cushman that they should not make, sell or attempt to make and sell, underreamers like the Double improved, and like the types mentioned. That was all there was to it. And when all was said and done, it was a very simple prohibition that was laid upon them, that they should

not make the Double improved underreamers and those that were in similitude to them, because they were invasions of the plaintiff's rights.

Now, with all of that mass of litigation, appeal, rehearing, argument, closet consideration—if I may use that phrase—of the merits of the defendant's device here—because there must have been much of it—these parties and their attorneys have worked—because the record and the briefs show it—and mulled over these devices until it has almost become a part of their second nature. The simple restraint was laid upon them by the judgment filed in these courts that they should not proceed to manufacture the Double improved underreamer; and in spite of all that, they have proceeded and are proceeding, and profess now to continue to proceed, unless this Court prevents them, to manufacture that which in substance and in form, as far as that is concerned, is the Double improved reamer, in so far as that substance and form has to do with the essential device and invention that was the underlying feature of the plaintiff's patent, as its scope and essentials were determined by Judge Cushman, and by which they were bound.

Now, the suggestion has been made that they gave the [76] matter careful study; that they have three counsel to advise them, and that those counsel, after giving the matter very careful study and consideration, advised them that they could with safety proceed to do this thing. A great English lawyer, speaking of the judgments of Lord Mansfield said, that in contemplating them he marveled at the

strength and stretch of the human understanding. I am almost in the same situation with respect to the strength, and particularly of the stretch of the understanding of counsel in this case. However, I have confidence in counsel and their statements, and that confidence is not a formal one; it is a substantial one, and will remain with this court until counsel give indubitable evidence that there is no foundation for it. I accept the statement of counsel that they in good faith themselves were of the opinion, and they themselves in good faith advised their client that it had the right to proceed to make and put out and vend the pocket type and "U" type of reamer; but in spite of all of that, and from my rather slight knowledge of the parties to this controversy—because I do not know any of them except as they are in this court—but judging from their mechanical astuteness and their ability to read that which is put before them, either of a mechanical or of a literary nature, I am rather inclined to doubt whether or not the directive officers of this company really considered that counsel knew what they were talking about. I am really inclined to doubt it. I think it would be an impeachment of their business acumen and practical acquaintance with the underreaming business, and the gist of these decisions as they must have become acquainted with them through their association with the cases here in court, aside from any other advice, or counsel that they may have sought from the outside or that may have supervened as between themselves. [77] And as I look at these devices, as I read the decision of Judge Cushman and as I see the

manner in which this litigation has progressed, there would be some difficulty in causing me to indulge in the sober and deliberate conclusion that the operative personnel of this company—the men who were familiar with the mechanical needs of the hour—the mechanical structure of these various devices—were really and truly, in good faith, of the belief that these devices were not infringements. It is patent to me that they are infringements, or else the court would send them out without loss of time. Patent, not only that they are infringements, but they are such open, obvious, flagrant infringements of the very things inhibited in the injunction as that they may be punished as for a contempt; because I realize the duty of the court, in the presence of doubt upon the proposition to remand these parties to a trial upon the merits, rather than to hear the matter in a summary form that contempt proceedings must necessarily be heard in.

Now, it occurs to me that if this defendant has really and truly, in good faith, such as would commend itself to a court or an individual having a conscience, if they had intended in such wise to do that which the law and their business interests would allow them to do, and require them to do, in order that they might properly further their own interests in the world, and at the same time to keep within the strict terms of that which every court of competent jurisdiction that had a chance to express itself on the subject had said that they should not do; if they had intended to do that, they would have gotten out this device in some form or fashion, notified the plaintiff

that they expected to claim that it was not a violation of the injunction, and ask that some way be arranged by which a hearing could be had upon the subject. [78]

Now, I know that there is plenty of authority—it seems to me the matter was presented to me, and I am rather inclined to think that I indicated that there was no particular propriety in coming into court and asking what could be done, and I accept that at 100 cents on the dollar; but I know of no law or rule or decision or precedent, or matter of impropriety which would have prevented them from asking the plaintiff if it had any objection to the manufacture and output of these two devices, and found out from the plaintiff what its construction of the injunction was, and whether or not it would assert that it was a violation, upon inspection. Then, if the plaintiff had said, "Why, no, I am sorry to say that is not a violation. It does not infringe at all upon our rights as defined by Judge Cushman"; then they could have gone ahead and the way would have been clear. But they did not do that. They did not even notify, in so far as the record shows, so far as I am advised, they did not even notify the plaintiff that they would put out this device and ask him to take such steps with respect to it as that the matter could be tried out in a manner known to and recognized by the law, even if it involved a contempt proceeding. It would have been a whole lot better for them to have been the parties to an immediate technical contempt proceeding than to have awaited the result of a contempt proceeding in which wilfulness is charged

and in which there is at *lease* some evidence to support the charge.

Mr. LYON.—Will your Honor permit an interruption right there. You recognize the fact that the Court has said that it is not familiar with the whole of this record. And **[79]** you will find that this pocket type reamer was brought to the attention of the plaintiff before this injunction was granted, and we stated that was what we were putting out, and had been putting out, and we heard no complaint of it until they brought the contempt proceedings. I call your Honor's attention to the fact that it is even in the briefs. They knew of it long before—months before they made any complaint of it.

Mr. WILSON.—No exception was made, your Honor, in the decree or judgment or injunction. It was presumed to have been the same as the rest, and presumed to have been included in the decree. We had every reason to suppose that it was, since no exception was made in its favor. We naturally expected that they would stop the manufacture of it, and presumed that they had, until we discovered it in the field.

The COURT.—Well, of course, it was referred to in substantial form—the pocket type, in the case—

Mr. LYON.—It is in the reply brief of the plaintiff.

The COURT.—It came up while the question was still *sub judice,* as to what was the proper construction of the Wilson patent. It was asserted, while the matter was still in the breast of the Court, so to

speak, that its manufacture was within the rights of the defendant.

Mr. LYON.—It was included within the injunction, by reference. That much is certain.

Mr. BLAKESLEE.—If the Court please, the injunction did not issue until the mandate came down last fall. It does not seem that it was incumbent upon the plaintiff to take any steps until that was done.

The COURT.—Well, be that as it may, whatever there was to it that was in violation of the complainant's rights, was foreclosed by the affirmance of the decree and the issuance of the injunction, and new light at that time must [80] have been brought to bear upon the understanding of the defendant, even if it thought it had the right theretofore to make the pocket type—if it thought it had the right to make all kinds of types, and that right was denied by the judgment of the Court, there was no more reason why it should proceed to make a type which theretofore it had made and which was palpably in violation of the injunction, any more than it should proceed to devise a new type which was similarly palpably in violation of the injunction. The mere question of the time when the idea first occurred to it does not seem to change the situation to any appreciable extent. And I am saying all of this with the reservation mentally and actually indulged in by me, that these parties are not acting in bad faith. If I thought they were acting in bad faith, and if I thought that this injunction had been wilfully violated, there would be a substantial jail sentence

meted out to each individual at all responsible for such violation, irrespective of his place, station or relation to the subject matter of the litigation. However, in spite of some very persuasive features, I am going to assume that the defendant has not done that which has been done wilfully. There has been, however, a violation of this injunction in at least two material and substantial respects: The manufacture and the putting out of the pocket type and the "U" Type, both being substantial replicas, in my judgment, with respect to at least one feature of the plaintiff's invention, of the forms and of the devices inhibited against in the injunction.

This is the court of the United States, set up by the Government of the United States, and it represents as best it may, and with all of the dignity that it can command, the sovereignty of the United States of America; and in so far as this Court makes orders, which it will be slow to do in an injunctive way, unless the cause and the right and necessity [81] therefor plainly exists, but in so far as it makes and indulges in injunctive orders, it is going to use every means at its command to see that they are obeyed. The stability of the Government, the dignity of its institutions, the peace, good order and welfare of society, require that that should be done, and this court will satisfy itself with nothing less than complete obedience to the orders and judgments of a lawful nature that it pronounces; and when there is a violation of an injunction of this Court, I hope that none will go away with the idea that it is apt to be

looked upon lightly or considered in any unsubstantial sense.

The violation of a due, orderly and proper judgment and prohibition of this Court is as direct an attack upon the integrity and stability of society as if a man should go out and try to foment a revolution in our midst; and this Court looks upon it in that spirit and from that point of view.

There is much involved in this case. There seems to be a good deal of money involved in this business. One would rather suspect that it is a profitable business. And being profitable, the returns being of a handsome nature, the amount of detriment that should be imposed upon one who unlawfully and wrongfully engages in the business, should be somewhat suited to the proportion of the return expected.

The judgment of the Court, therefore, will be in the following form, and counsel will prepare a decree embodying such as may be necessary, in this wise:

That the defendant, Union Tool Company, is adjudged guilty of contempt of this court, in that it has since the issuance and service of the injunction, manufactured and put out, and offered for sale and sold, a so-called pocket type of underreamer; and also in that it has, in a similar way, manufactured and put out, and sold and offered for sale a so-called "U" type of underreamer; and as punishment for such contempt, it is ordered and adjudged that the Union [82] Tool Company pay a fine in the sum of $5,000, one-half of which shall be awarded to the complainant in this case; that execution upon this judgment do issue, and if the fine be not paid within twenty

days from the date of the judgment, then the president of the Union Tool Company, Edward Double, stands committed to jail until the fine be paid.

Mr. LYON.—If your Honor please, I would like to first reserve exceptions to each of the rulings of the Court; and while I have not examined the act carefully, I would ask your Honor to examine the question before entering the judgment, as to whether the fine imposed is not in excess of the amount fixed by the Clayton Act.

The COURT.—Why?

Mr. LYON.—Because the Clayton Act limits the fine to a thousand dollars.

The COURT.—Oh, no; that refers to a natural person, not a corporation.

Mr. LYON.—We except to the order made in regard to the fine; and so that we may not take up your time hereafter, we will prepare a bill of exceptions, and then upon the preparation of those, we will ask the allowance of a writ of error, and at that time, of course, if your Honor desires us to give a bond for the payment of this fine, we will be pleased to do so.

The COURT.—Oh, I don't know about that. We will take that up and see how you conduct yourselves hereafter. This court is an open forum for the redress of grievances sought herein from day to day.

Mr. LYON.—I understand that. Now, I will say this, that while Mr. Double is ill in bed and cannot be approached at the present time, that I will see that instructions are wired to all their representatives, that no more of these "U" types shall be sold and delivered. I will get at that [83] at the earliest

possible moment, to show our good faith in that regard.

The COURT.—Well, that helps out.

Mr. ANDREWS.—If the Court please, in that respect, so that we maye thoroughly understand what the Court's position is, and in that way to the extent that it is proper now to avoid any possible repetition in any way of a violation of what the Court understands and believes to be the decision of Judge Cushman in the order of injunction, if the Court is so minded, I would like to inquire or ascertain whether I am correct in understanding that the infringement referred to consists of the widening of the inthrust bearing beyond that shown in the model and drawings of the Double No. 2 patent?

The COURT.—It consists in the widening of the inthrust bearing so that it extends beyond the outer diameter of the recess or pocket. In other words, you have got to make the bearing on your cutter the same diameter as the diameter of the pocket or inner recess.

Mr. ANDREWS.—As shown in the Double No. 2 patent, as I understand you?

The COURT.—Well, I don't know about these numbers; you have got too many of them.

Mr. ANDREWS.—Well, the only one I have discussed.

The COURT.—Well, you have got too many of them. But that is very plain. You are not entitled to go beyond the edge of that recess or pocket with your inthrust bearing. Now, that is my construction of the decree. It is the shearing off of this portion

up here (vertically, face of bearing up) and not the shearing off of that (laterally, edge of pocket out), (illustrating on models), that constitutes the infringement and violation of the injunction—the shearing off and use of that part of the webb lying immediately to the side of the line of the pocket. [84]

Mr. LYON.—Not beyond the secondary dovetail?

The COURT.—Not beyond the secondary dovetail. Does that answer your question now, Mr. Andrews?

Mr. ANDREWS.—With one exception. Does the Court in that statement refer entirely to the bearing surface—the width of the bearing surface that is obtained at whatever the shearing off process might be?

The COURT.—If I understand you, I do.

Mr. ANDREWS.—This is purely a practical question.

The COURT.—It refers to the width of the bearing surface, as the same may extend beyond the limits of the recess or pocket, from there on.

Mr. ANDREWS.—What we are talking about now—this is the width of the bearing surface (indicating).

The COURT.—I am speaking of the bearing surface that lies outside of the recess of this pocket, forming primary, secondary or both dovetails. Does that answer your question?

Mr. ANDREWS.—Yes, sir, I think it does, if the Court please.

The COURT.—All right. Take a recess. [85]

[Endorsed]: Original. In the District Court of the United States for the Southern District of Cali-

fornia, Southern Division. Hon. Benjamin F. Bledsoe, Judge Presiding. A.–4—B.–62, Consolidated. Elihu E. Wilson, Plaintiff, vs. Union Tool Company, Defendant. Oral Opinion of the Court. Los Angeles, California, July 30, 1919. Filed Aug. 4, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. Doyle & St. Maurice, Shorthand Reporters and Notaries, 503–508 California Building, Los Angeles, California, Main 2896. **[86]**

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

No. A.–4—B.–62, Consolidated.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Decree in Contempt.

This cause having come on to be heard upon the pleadings and proofs herein filed on behalf of both parties and it appearing that an injunction was regularly issued in this cause under the seal of this Court on November 6th, 1918, following the mandate of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment and decree of this Court previously rendered; and that said injunction was, on November 14th, 1918, duly served on the de-

fendant, Union Tool Company, and Edward Double, its president; P. W. Masten, its secretary, and Will Steart, its vice-president.

That the said injunction is addressed to the Union Tool Company, its officers, directors, attorneys, agents, servants, workmen, employees and assistants whom it commands and enjoins to forthwith and immediately refrain from manufacturing or causing to be manufactured, using or causing to be used, leasing or causing to be leased, selling or causing to be sold in any manner either directly or indirectly, any underreamer or underreamers like or embodying the construction or inter-relation or formation of parts of either "Complainant's Exhibit Improved Double Reamer and Cutters," or "Complainant's Exhibit Defendant's Reamer Type 'D'," or "Complainant's Exhibit Reamer Type 'E.'" or "Complainant's Exhibit Reamer Type 'F'" [87] (being exhibits offered and received in evidence in this cause) and from manufacturing or causing to be manufactured, selling or causing to be sold, using or causing to be used, leasing or causing to be leased any part or parts or elements calculated and intended to be combined or used as a part or feature of any underreamer or device in infringement of letters patent No. 827,595 (being the letters patent sued on in this cause), that is, of claims 9 and 19 thereof, in any manner whatsoever, or from manufacturing or causing to be manufactured, using or causing to be used, selling or leasing or causing to be sold or leased, either directly or indirectly, any combination or parts or elements or features capable

of being assembled together or used in infringement of said letters patent No. 827,595, that is of claims 9 and 19 thereof.

And it further appearing that on April 26, 1919, upon affidavits duly presented, the complainant, herein moved and this Court granted an order citing the defendant Union Tool Company and its officers, to wit, Edward Double, president, William Stewart, vice-president, and P. W. Masten, secretary and such other and furnish officers, agents, employees, workmen and others as may have violated the aforesaid injunction, to appear in this court on May 5th, 1919, and then and there show cause why it and each of them should not be punished for contempt of this Court's injunction, aforesaid, as alleged and set forth in complainant's petition and affidavits in support thereof, of all of which the defendant and its officers, Edward Double, president, William Stewart, vice-president, and P. W. Masten, secretary, and its counsel herein were duly notified by personal service upon them on April 28th, 1919, a copy of said petition, said affidavits, said motion, and said order; and pursuant to adjournments theretofore duly had, the 23d day of July, 1919, at 10 o'clock, A. M., was fixed as the time for hearing said alleged contempt; and the defendant and its said officers appeared in this Court by counsel, at the time appointed, [88] in response to said motion and the allegations contained in said petition and said affidavits, and the hearing of said contempt was proceeded with on July 23d, and 24th, 1919, in open court in support and in denial of the charges therein

contained; and after due proceedings had, upon consideration of the evidence adduced, and of all the files and records of the above-entitled court herein, and of the arguments of counsel, the court, being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED:

I.

That the defendant, Union Tool Company, is guilty of contempt of this court in that it has since the issuance and service of the said injunction and contrary to and in defiance of the commands thereof, manufactured and put out, offered for sale and sold a so-called "Pocket Type" Underreamer, which is not substantially or even colorably different from the devices particularly identified and described in said injunction and whose manufacture, sale or use is inhibited therein.

II.

That the defendant, Union Tool Company, is guilty of contempt of this Court in that it has since the issuance and service of the said injunction and contrary to and in defiance of the commands thereof, manufactured and put out, offered for sale and sold a so-called "U Type" of Underreamer which is not substantially or even colorably different from the devices particularly identified and described in said injunction and whose manufacture, sale or use is inhibited therein.

III.

That the defendant, Union Tool Company, has since the issuance and service of the said injunction offered for sale and sold extra, spare and repair

parts and elements for, and to be used with, its devices sold prior to the issuance and service of said injunction, but it is purged of contempt in that particular behalf, without prejudice to the right on the part of the plaintiff to renew its application hereafter. [89]

IV.

That the defendant, Union Tool Company, in virtue of such contempt so committed, is herein and hereby ordered and required to pay the clerk of the above-entitled court, forthwith, a fine of Five Thousand Dollars ($5,000.00), out of which said sum and amount, when so paid into said clerk, and the costs herein having been otherwise met and paid in full, he is herein and hereby authorized and directed to pay over to the said complainant herein, Elihu C. Wilson above named, forthwith, the sum of Two Thousand Five Hundred Dollars ($2,500) as a reasonable portion of the expenses incurred by the complainant in the instant proceedings.

V.

That execution upon this judgment be issued, and if the said fine be not paid into this court within twenty days from the date of this judgment, then and in that event the president of the defendant Union Tool Company, Edward Double, shall stand committed to the jail of Los Angeles County, State of California, and be confined therein until the same be paid.

Dated August 8th, 1919.

BENJAMIN F. BLEDSOE,
United States District Judge.

Decree entered and recorded August 8th, 1919.

CHAS. N. WILLIAMS,
Clerk.
By Maury Curtis,
Deputy Clerk.

Approved as to form, as provided in Rule 45, this —— day of August, 1919.

_____,
Solicitor for Defendant. [90]

[Endorsed]: In the United States District Court, Southern District of California, Southern Division. In Equity—No. A.–4—B.–62 (Consolidated). Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. Decree in Contempt. Service of a copy of the within Decree in Contempt is hereby acknowledged this 7th day of August, A. D. 1919. ——, Solicitor and Counsel for Defendant. Filed Aug. 8, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. G. Benton Wilson, Solicitor and Counsel for Complainant, 2301 East Vernon Avenue. Los Angeles, California. [91]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

Nos. A.–4 and B.–62, Consolidated.

ON CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,
Complainant,

vs.

UNION TOOL COMPANY,
Defendant.

Petition for Writ of Error.

Union Tool Company, defendant in above-entitled cause, and Edward Double, its president, each feeling aggrieved by the judgment or order or decree on contempt of said court made, entered and recorded in said cause on August 8th, 1919, whereby defendant Union Tool Company was adjudged in contempt and ordered and required to pay the clerk of said court forthwith a fine of $5,000, and that an execution upon such judgment be issued, and if said fine be not paid into said court within twenty days from the date of said judgment, then and in that event the president of the Union Tool Company, Edward Double, shall stand committed to the jail of Los Angeles County, State of California, and be confined therein until the same has been paid, come now, by A. V. Andrews and Frederick S. Lyon, their attorneys, and pray this court for an order allowing the said defendants Union Tool Company, and said Edward Double, and each of them to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security, if any, which the defendants Union Tool Company, and said Edward Double or either of them shall give; and that upon the giving of such security all further proceedings in this court upon said order or decree be suspended [92] and stayed until the determination of said writ of error

by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated August 16th, 1919.

A. V. ANDREWS,
FREDERICK S. LYON,
Attorneys for Defendants. [93]

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

Nos. A.–4 and B.–62, Consolidated.

ON CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Order Allowing Writ of Error.

Upon motion of A. V. Andrews, Esq., and Frederick S. Lyons, Esq., attorneys for the defendant Union Tool Company above named, and appearing also for Edward Double, and upon the filing of the petition of the said defendant, Union Tool Company, and Edward Double for a writ of error, together with the assignments of error in due form,—

IT IS HEREBY ORDERED that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit be allowed as prayed for in said

petition, and that the amount of the bond to be given by said defendant Union Tool Company upon said writ of error to act as a supersedeas to stay the issuance of execution upon the judgment directing said Union Tool Company to pay a fine of five thousand dollars ($5,000.00), be and the same is hereby fixed at the sum of ten thousand dollars ($10,000.00), the same to cover costs upon appeal on said writ of error.

And it is FURTHER ORDERED that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 27th, 1919.

BLEDSOE,
District Judge. **[94]**

[Endorsed]: Nos. A.–4 and B.–62, Cons. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity. Petition for Writ of Error and Order Allowing Writ of Error. Filed Aug. 27, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Defendant. **[95]**

In the United States District Court for the Southern District of California, Southern Division.

IN EQUITY.

A.–4—B.–62, Consolidated.

CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS, that the Maryland Casualty Company, a corporation, of the State of Maryland and duly licensed to transact business in the State of California, is held and firmly bound unto the Union Tool Company, the defendant in the above-entitled cause, in the penal sum of Five Hundred Dollars ($500.00), to be paid to the said Union Tool Company, its successors and assigns, for which payment well and truly to be made the Maryland Casualty Company binds itself, its successors and assigns, firmly by these presents.

Sealed with its corporate seal and dated this 17th day of September, A. D. 1919.

The condition of this obligation is such that, whereas Elihu C. Wilson, the complainant in the above-entitled cause, is prosecuting a cross writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the United

States District Court for the Southern District of California, Southern Division, made and entered on the 8th day of August, A. D. 1919, in contempt proceedings, in the above-entitled cause. [96]

Now, therefore, if the said complainant, Elihu C. Wilson, shall prosecute his said cross writ of error to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof the said Maryland Casualty Company has hereunto affixed its corporate seal and attested same by its duly authorized attorney in fact, at Los Angeles, California, this 17th day of September, A. D. 1919.

MARYLAND CASUALTY COMPANY.
By GEO. W. BLISS. (Seal)
Attorney-in-fact.

State of California,
County of Los Angeles,—ss,

On this 17th day of September, A. D. 1919, before me, a notary public in and for said County and State, personally appeared Geo. W. Bliss, known to me to be the duly authorized attorney-in-fact of the Maryland Casualty Company and the person whose name is subscribed to the foregoing instrument, who acknowledged to me that he subscribed the name of the said Maryland Casualty Company thereto as principal and his own name as attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] ELIZABETH F. HILLMAN,
Notary Public.

My commission expires Oct. 6, 1921.

Examined and recommended for approval as provided in Rule 29.

G. BENTON WILSON,
Solicitor for Complainant.

I hereby approve the foregoing bond.

Dated the 18th day of September, A. D. 1919.

ROSS,
Circuit Judge. [97]

[Endorsed]: No. A.–4—B.–62.—Eq. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. Contempt Proceedings. In Equity—A.–4—B.–62 (Consolidated). Bond. Filed Sept. 18, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. G. Benton Wilson, 2301 East Vernon Ave., Los Angeles, California, Solicitor for Complainant. [98]

In the United States District Court for the Southern District of California, Southern Division.

IN EQUITY.

A.–4—B.–62, Consolidated.

CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Assignment of Errors.

Now comes the complainant in the contempt proceedings in the above-entitled cause and files the following assignment of errors of record upon which he will reply in the prosecution of the cross writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of this Court entered on the 8th day of August, A. D. 1919.

I.

That the United States District Court for the Southern District of California, Southern Division, erred in not adjudging the defendant and its officers guilty of willful contempt of the injunction of said Court prohibiting the manufacture, sale or use by defendant or its officers of extra, spare or repair parts or elements for, or to be used with, the defendant's infringing underreamers, when the said Court found that the defendant had, since the issuance and service of said injunction, offered for sale and sold, said extra, spare and repair parts for, and to be used with, said infringing underreamers.

II.

That the said Court erred in purging the defendant and its officers of contempt when said Court found that the defendant had, since the issuance and service of the injunction of said Court, manufactured and sold extra, spare and repair parts and elements for use with the defendant's infringing underreamers previously manufactured and sold by it to dealers and users, notwithstanding the said injunction prohibits the manufacture, sale or use of said extra, spare or

repair parts or elements by the defendant or its [99] officers for said infringing underreamers.

III.

That the said Court erred in holding that the defendant is free to manufacture and sell to dealers and users extra, spare and repair parts and elements to be used with the combination underreamers the said defendant previously manufactured and sold to dealers and users in infringement of the complainant's patent in suit, when the manufacture, sale or use, by the defendant, of these extra, spare and repair parts or elements is expressly prohibited by the said Court's injunction.

IV.

That the said Court erred in not holding the defendant and its officers guilty of willful contempt for violating the injunction theretofore duly issued and served, by their contributory infringement in manufacturing and selling extra, spare and repair parts and elements knowing and intending that same were to be assembled by dealers or users into the combination devices previously held by said Court to infringe the complainant's patent in suit, and whose further manufacture, sale or use is prohibited by said injunction.

V.

That the said Court erred in not holding the defendant and its officers guilty of willful contempt of said Court's injunction in manufacturing and selling extra, spare and repair parts and elements incapable of use otherwise than to be assembled into the defendant's infringing combination underreamers whose

manufacture, sale or use, together with the manufacture, sale or use of the extra, spare and repair parts or elements therefor, is prohibited by the said injunction heretofore issued in this cause and duly served on the defendant and its officers. [100]

Wherefore the complainant prays that the portion of the said decree complained of be reversed and that said District Court for the Southern District of California, Southern Division, be ordered to enter a decree reversing the portion of the decision of the lower Court complained of in said cause, and awarding to the complainant such other and further relief as may appear just and equitable.

G. BENTON WILSON,
Solicitor for Complainant.

[Endorsed]: No. A.-4—Esq. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—A.-4—B.-62, Consolidated. Contempt Proceedings. Assignment of Errors. Filed Sep. 17, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. G. Benton Wilson, 2301 East Vernon Ave., Los Angeles, California, Solicitor for Complainant. [101]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

Clerk's Office.

IN EQUITY.

No. A.–4—B.–62, Consolidated.

CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,

Plaintiff,

vs.

UNION TOOL COMPANY,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please prepare a certified transcript of record, in accordance with and in response to the plaintiff's writ of error allowed, as follows and including:

Interlocutory decree.

Writ of injunction.

Motion that defendant be punished for contempt of Court, with the exception of the photographic exhibits and catalogues attached thereto.

Order to show cause.

Stipulation of facts.

Opinion.

Decree in contempt.

Petition for writ of error.

Order allowing writ of error.

Bond of Elihu C. Wilson.
Assignment of errors.
Copy of this praecipe.

G. BENTON WILSON,
Attorney for Plaintiff. **[102]**

[Endorsed]: In Equity—No. A.-4—B.-62, Consolidated, Contempt Proceedings. U. S. District Court, Southern District of California, Southern Division. Elihu C. Wilson, Plaintiff, vs. Union Tool Company, Defendant. Praecipe for Record on Writ or Error. Filed Sep. 19, 1919. Chas. N. Williams, Clerk. By R. S. Zimmerman, Deputy Clerk. **[103]**

Nos. A.-4—B.-62—EQUITY (Consolidated).

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing 103 pages, numbered from 1 to 103, inclusive, to be a full, true and correct copy of interlocutory decree, writ of injunction, motion that defendant be punished for contempt of Court, with supporting affidavits, with exception of the photographic exhibits and catalogues attached thereto, which are omitted pursuant to the

instructions of the attorney for the plaintiff in error, order to show cause, stipulation of facts, Opinion, decree in contempt, petition for writ of error, order allowing writ of error, bond of Elihu C. Wilson, Assignment of errors, and praecipe for transcript, in a contempt matter in the above and therein entitled cause, and that the same together constitute the record on writ of error in said matter and cause, as specified in the praecipe for transcript; said record also contains the original citation and original writ of error.

I DO FURTHER CERTIFY, that the cost of the foregoing transcript on writ of error is $25.40, the amount whereof has been paid me by the plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and [104] affixed the seal of the District Court of the United States of America, in and for the Southern District of California, this thirtieth day of September, in the year of our Lord, one thousand nine hundred and nineteen, and of our Independence, the one hundred and forty-fourth.

[Seal] CHAS. N. WILLIAMS,
Clerk of the United States District Court, in and for the Southern District of California.

By R. S. Zimmerman,
Deputy Clerk. [105]

[Endorsed]: No. 3397. United States Circuit Court of Appeals for the Ninth Circuit. Elihu C. Wilson, Plaintiff in Error, vs. Union Tool Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed October 2, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States District Court for the Southern District of California, Southern Division.

IN EQUITY—A.-4—B.-62 (Consolidated).

CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,

Complainant,

vs.

UNION TOOL COMPANY,

Defendant.

Petition for Cross Writ of Error.

To the Honorable BENJAMIN F. BLEDSOE, District Judge.

The above-named complainant shows that a decree in contempt proceedings having been rendered and entered in the above-entitled cause on the 8th day of August, A. D. 1919, and the above-named defendant having secured an allowance of a writ of error by virtue of which the United States Circuit Court of Appeals for the Ninth Circuit has designated and set the 9th day of October, A. D. 1919, at its courtroom in the city and county of San Francisco, State of California, as the time and place for reviewing the said decree under said writ of error,—

Now, the above-named complainant also feeling aggrieved by the said decree in contempt, prays this Court for an order allowing him to prosecute a cross writ of error from said decree to the said United States Circuit Court of Appeals for the Ninth Circuit for the reasons and errors of record set forth in the

assignment of errors filed herewith, and he prays that citation may be issued as provided by law, and the transcript of record, proceedings and documents upon which said decree was based, all of which have been duly authenticated and sent to the said United States Circuit Court of Appeals for the Ninth Circuit for the hearing of defendant's writ of error, will be used as the transcript of record and proceedings at the hearing of this cross writ of error under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Dated September 17th, A. D. 1919.

G. BENTON WILSON,
Solicitor for Complainant.

[Endorsed]: No. ——. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—A.-4—B.-62 (Consolidated). Contempt Proceedings. Petition for Cross Writ of Error. Filed Sep. 17, 1919. Chas. N. Williams, Clerk. Maury Curtis, Deputy Clerk. G. Benton Wilson, 2301 East Vernon Ave., Los Angeles, California, Solicitor for Complainant.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original petition for cross writ of error filed in my office September 17th, 1919, in the cause entitled Elihu C. Wilson, Com-

plainant, vs. Union Tool Company, Defendant, No. A.–4—B.–62—Equity, Consolidated, Southern Division, as the same remains on file therein.

ATTEST my hand and the seal of said District Court, this 23d day of October, A. D. 1919.

[Seal] CHAS. N. WILLIAMS,
Clerk.
By R. S. Zimmerman,
Deputy Clerk.

[Endorsed]: Nos. A.–4 and B.–62—Eq. (Consolidated). United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. Certified Copy of Petition for Cross Writ of Error.

No. 3397. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 27, 1919. F. D. Monckton, Clerk.

In the United States District Court, for the Southern District of California, Southern Division.

IN EQUITY—A.–4—B.–62 (Consolidated).

CONTEMPT PROCEEDINGS.

ELIHU C. WILSON,
Complainant,

vs.

UNION TOOL COMPANY,
Defendant.

Order Allowing Cross Writ of Error.

This day came the complainant herein, by its counsel, and presented a petition for a cross writ of error and an assignment of errors accompanying the same, which petition is hereby allowed and the complainants allowed a cross writ of error to the United States Circuit Court of Appeals for the Ninth Circuit upon the filing of a bond in the sum of Five Hundred Dollars ($500.00), with good and sufficient security to be approved by the Court.

Dated September 17, A. D. 1919.

ERSKINE M. ROSS,
U. S. Circuit Judge.

[Endorsed]: No. A.–4—B.–62—Eq. United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. In Equity—A.–4—B.–62 (Consolidated). Contempt Proceedings. Order Allowing Cross Writ of Error. Filed Sep. 17, 1919. Chas. N. Williams, Clerk. By Maury Curtis, Deputy Clerk. G. Benton Wilson, 2301 East Vernon Ave., Los Angeles, California, Solicitor for Complainant.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original order allowing cross writ of error filed in my office September 17, 1919, in the cause entitled Elihu C. Wilson, Complainant, vs. Union Tool Company, Defend-

ant, No. A.–4 and B.–62—Equity, Southern Division, as the same remains on file therein.

ATTEST my hand and the seal of said District Court, this 23d day of October, A. D. 1919.

[Seal] CHAS. N. WILLIAMS,
Clerk.

By R. S. Zimmerman,
Deputy Clerk.

[Endorsed]: Nos. A.–4 and B.–62—Eq. (Consolidated.) United States District Court, Southern District of California, Southern Division. Elihu C. Wilson, Complainant, vs. Union Tool Company, Defendant. Certified Copy of Order Allowing Cross Writ of Error.

No. 3397. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 27, 1919. F. D. Monckton, Clerk.

[Endorsed]: Printed Transcript of Record. Filed October 22, 1919. F. D. Monckton, Clerk.

No. 3397

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Notice of Motion to Dismiss Writ of Error.

To Elihu C. Wilson, Plaintiff in Error, and George Benton Wilson, Esq., His Attorney:

Please take notice that on Monday, February 2, 1920, at 10:30 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, defendant in error will bring on for hearing and determination before the above-named court at the courtroom thereof in the Postoffice Building in the City of San Francisco, California, the attached Motion to Dismiss Writ of Error herein.

A. V. ANDREWS,
FREDERICK S. LYON,
Attorneys for Defendant in Error.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Motion to Dismiss Writ of Error.

Comes now Union Tool Company, defendant in error, by Frederick S. Lyon and A. V. Andrews, its attorneys, and moves this Court to dismiss the writ of error herein sued out by Elihu C. Wilson as plaintiff in error, upon each of the following grounds:

1. That this Court has no jurisdiction to entertain or consider said writ of error.

2. That the judgment sought to be reviewed is a judgment of acquittal in a criminal proceeding; that Elihu C. Wilson is not a proper party as plaintiff in error to prosecute a writ of error for a review of such judgment of acquittal; that the United States of America by the United States District Attorney for the Southern District of California is the only party entitled to sue out or maintain a writ of error for review of such judgment of acquittal, if anyone.

3. That a writ of error is not a proper or legal remedy or proceeding by which to seek a review of the matters or things set forth in the assignments of error by Elihu C. Wilson as plaintiff in error herein.

4. That if any remedy exists on behalf of Elihu C. Wilson to review the judgment or decree sought to be reviewed, it is by appeal and not by a writ of error.

5. That if the contempt proceedings sought to be reviewed or the judgment of acquittal therein sought to be reviewed can be contrued as a civil proceeding, review thereof must be by appeal as the suit is in equity and a writ of error does not lie.

6. That if the said contempt proceeding or the judgment of decree thereof can be construed as a civil proceeding, or a civil decree in equity, the judg-

ment or decree sought to be reviewed is interlocutory and not final and not appealable.

7. That if the contempt proceeding sought to be reviewed can be construed as a civil proceeding, the judgment or decree sought to be reviewed is not final; on the contrary, such judgment or decree was "without prejudice to the right on the part of the plaintiff to renew its application hereafter."

8. That if the contempt proceedings attempted to be reviewed herein can be construed as a civil proceeding, said Elihu C. Wilson has not filed in this court a certified record of the case upon which the same was heard in the lower court.

9. That if the contempt proceedings attempted to be reviewed herein can be construed as a civil proceeding, the alleged "transcript of record" filed by Elihu C. Wilson is not prepared or certified as required by law and has no standing in this court, and there is nothing before the Court upon which the Court can review the decree sought to be reviewed.

10. Elihu C. Wilson, as plaintiff in error, has not secured the allowance of any bill of exceptions and no bill of exceptions is contained in the purported "transcript of record" filed by Elihu C. Wilson herein.

11. That there is no bill of exceptions or transcript of record on file or presented to this Court, which has been prepared or certified as required by law.

Statement of Facts Under Rule 21.

An injunction was issued by the United States District Court, Southern District of California, in suit in equity, wherein Elihu C. Wilson was plaintiff and Union Tool Company defendant. This is referred to in the opinion of this Court filed January 5, 1920,

Case No. 3393, Union Tool Company et al., Plaintiffs in Error, vs. United States of America and Elihu C. Wilson, Defendants in Error.

The United States of America did not secure the allowance of any bill of exceptions on its behalf nor did it sue out any writ of error in the contempt proceedings or from the judgment or decree in such contempt proceedings.

The judgment or decree in such contempt proceedings resulted in a certain fine as to certain matters. This fine was reviewed by this Court in Case No. 3393.

The judgment in such contempt proceedings as to certain other matters purged defendant of the charge of contempt in those particulars, "without prejudice to the right on the part of the plaintiff to renew its application hereafter." Plaintiff has never renewed such application.

Elihu C. Wilson has not prepared or secured the allowance of a bill of exceptions but simply presents an alleged transcript of record prepared under the instructions of his attorney and not certified to contain all of the record upon which the contempt proceedings were heard. Nor does it contain all of the same so far as the matters sought to be reviewed are concerned.

A. V. ANDREWS,
FREDERICK S. LYON.
Attorneys for Defendant in Error.

[Endorsed]: No. 3397. United States Circuit Court of Appeals for the Ninth Circuit. Notice of and Motion to Dismiss Writ of Error. Filed Feb. 2, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the second day of February, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Order of Submission and Motion to Dismiss Writ of Error, etc.

ORDERED motion, filed January 8, 1920, to dismiss writ of error in the above-entitled cause, and the cause on the merits argued by Mr. Frederick S. Lyon, counsel for the defendant in error, and by Mr. G. Benton Wilson, counsel for the plaintiff in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventeenth day of May, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Order Directing Filing of Opinion and Filing and Recording of Judgment.

By direction of the Honorable William B. Gilbert and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with said opinion.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge:

Upon an appeal from an interlocutory decree, holding that Wilson patent No. 827,595 for an underreamer was valid as to several certain claims and was infringed as to claims 9 and 19, and awarding an accounting, this Court affirmed the decree of the District Court. A full history of the case is given in Union Tool Company vs. Wilson, 249 Fed. 736. Thereafter, in contempt proceedings instituted in the District Court, the Union Tool Company was held to have violated the injunction issued in Union Tool Company vs. Wilson, *supra,* by having manufactured, offered for sale and sold two types of underreamers, neither of which was substantially or even

colorably different from the respective devices described in the injunctive order of the Court, the manufacture, sale and use of which underreamers were inhibited; and that the Tool Company, since the issuance and service of the injunction, had offered for sale and sold extra, spare and repair parts and elements for and to be used with its device sold prior to the issuance and service of the injunction. The Court, however, purged the corporation of contempt in the matter of sales of repair parts but made the order without prejudice to the right of Wilson to renew his application. The Company was fined $5,000, out of which sum, when paid, the clerk of the Court was authorized to pay over to the complainant, Wilson, $2,500 as a reasonable portion of the expenses incurred by the complainant in the contempt proceeding, and the Court ordered that if upon execution the fine was not paid, the president of the Tool Company, Double, should stand committed to jail and be confined until the fine was paid.

Writ and cross-writ of error were sued out and upon the writ brought by the Union Tool Company and Double to review the judgment of conviction, this Court reversed the clearly punitive portion of the decree of the District Court but affirmed that portion which imposed a fine and directed that the fine imposed should be paid to the complainant to cover his costs. Union Tool Co. et al. vs. United States et al., 262 Fed. 431.

By the cross-writ now before us we are to review that portion of the judgment of the District Court wherein the Tool Company was purged of contempt.

The Tool Company, however, first questions our jurisdiction and contends that appeal, not writ of error, is the proper remedy. Inasmuch as the contempt proceeding had two aspects, criminal and civil, the criminal dominated and in seeking review the Tool Company properly sued out writ of error. Matter of Christensen Engineering Co., 194 U. S. 458. But as both the punitive and remedial phases were before the District Court and both were considered, both may be reviewed upon writ of error. Proudfit L. L. Co. vs. Kalamazoo L. L. Co., 230 Fed. 120; Kreplik vs. Couch Patents Co., 190 Fed. 565. It would be strange if merely because there was a reversal of the criminal aspect of the judgment, the party in whose favor the remedial order was affirmed should now be denied relief and thus be obliged to proceed anew by another procedure. Such a ruling would be out of accord with section 4 of the Act to amend the Judicial Code, approved September 6, 1916, 39 Stat. L. 726, which provides that "No Court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed." We therefore deny the motion to dismiss.

Upon the merits: The position of Wilson is that the District Court erred in the order purging of contempt, because in the trial upon the contempt pro-

ceeding it was stipulated that before and since the service of the injunction already referred to, the Tool Company not only had manufactured and sold and intended to continue to manufacture and sell the double pocket type of underreamer and the double type U underreamer, together with extra, spare and repair parts therefor, but also had manufactured and sold and intended to continue to manufacture and sell cutters, springs, rods, cotter pins and all parts except bodies, as extra or repair parts for and to be used with the underreamers, particularly referred to and described in the interlocutory decree and injunction which had been issued in the case and which were sold by the defendant to dealers and users prior to the service of the injunction. By the writ of injunction the Tool Company and its officers and agents were enjoined from "manufacturing, using, leasing, selling or causing to be sold in any manner, underreamers like or embodying the construction or interrelation or formation of parts of complainant's double reamer and extras or type D (in exhibit) or a reamer, Type E, or a reamer Type F, and from manufacturing, selling, using or leasing any part or parts or elements calculated and intended to be combined or used as a part of or feature of any underreamer or device in infringement of letters patent, No. 827,595, being the letters patent sued on in this case, that is, claims 9 and 19 thereof, in any manner whatever; or from manufacturing or causing to be manufactured, using or causing to be used, selling or leasing or causing to be sold or leased, either directly or indirectly any combination

of parts or elements or features capable of being assembled together or used in infringement of said letters patent, No. 827,595, that is, of claims 9 and 19 thereof." It is plain that in the light of the finding, and considering the injunction order of the District Court, the only legal conclusion to be reached is that there was a deliberate violation and a contempt, and that it was error to purge of such contempt, unless there is merit in the contention that the order of the District Court was not a positive injunction against the manufacture of all parts or elements of the device, but only as against the manufacture or use or sale of "any part or parts or elements calculated and intended to be combined or used as a part of or feature of any underreamer or device in infringement of said letters patent, No. 827,595, that is, of claims 9 and 19 thereof." The theory advanced is that the Wilson patent is for a combination; that the infringement adjudged was the manufacture and sale by defendant of complete underreamers embodying the combination of the respective claims 9 and 19 of the patent; that the infringement was of the underreamer as an entirety, that is, a combination; that the unconditional sale of a patented machine carries with it a right to the purchaser or his successors in interest, to maintain such machine in operative condition; that the purchaser has the right himself to make all repairs necessary to keep the machine in operation and may make new parts and therefore, it having been adjudged that the cutters or bits do not infringe claims 16 or 17 of the patent; that supplying substitute cutters is not

supplying the combination, but is repairing the combination, that is the repair of a licensed combination underreamer. The rule of contributory infringement, however, does not uphold the contention. In Thompson Houston vs. Ohio Co., 80 Fed. 712, it was held by the Court of Appeals that it was settled that where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such combination, he is guilty of contributory infringement and is equally liable to the patentee with him, who in fact organizes the complete combination. Judge Taft, for the Court said: "Many of the most valuable patents are combinations of nonpatentable elements and the only effective mode of preventing infringement is by suits against those who, by furnishing the parts which distinguish the combination, made it possible for others to assemble and use the combination and who, by advertisement of the sale of such parts and otherwise, intentionally solicit and promote such invasions of the patentee's rights."

The plea that the parts manufactured and sold to dealers and users were for repair only, is not altogether substantial, inasmuch as the stipulation of facts in the record and the finding of the lower Court show that the Tool Company had offered for sale and sold "extra, spare and repair parts and elements" for and to be used with the infringing underreamers. The principle that a right of the user of a patented device extends to repairs of the device, does not go to the extent of replacing parts such as obtaining duplicates or spare parts and extras in anticipation of

breakage or destruction. National Casting Co. vs. American Steel Foundries, 182 Fed. 626; Slocomb & Co. vs. Laymen Co., 227 Fed. 94. The fact that the purchaser of extra, spare and repair parts may have no body portion of the underreamer, does not necessarily affect the question where the infringer has sold all parts required to reconstruct the combination where the purchasers have underreamer bodies of the infringed type. Wilson vs. Simpson, 9 How. 109. Morrin vs. White Works, 138 Fed. 68. But further discussion of possible distinctions between repairs and construction becomes unnecessary in view of the terms of the injunction and identification of the devices made in the decree and the admissions of the Tool Company that the extra, spare and repair parts were intended for use with such devices. Leeds Catlin vs. Victor Talking Machine Co., 213 U. S. 325.

It is argued that when Wilson secured a decree granting accounting of profits and damages resulting from the infringement, that thereby the infringing devices were released in the hands of the users and that for Wilson to seek profits and damages for the past infringements and also to seek injunction against further manufacture of the extra, spare and repair parts and elements, is to ask two remedies for one wrong. The error of this position, as we view it, is that it conflicts with the rule that the infringing devices are not free in the hands of the users until the patentee whose rights have been transgressed, has received full satisfaction for the transgression. Sherman-Clay vs. Searchlight Horn Co., 225 Fed. 497; Stebler vs. Riverside Heights Orange Growers Asso-

ciation, 214 Fed. 550. In the Stebler case, decided by this Court, the patentee and the manufacturing infringer sold directly to users only, and all profits and damages became involved in the suit, whereas, in the case under consideration the patentee, Wilson, and the manufacturing infringer, the Tool Company, sell to dealers and re-sellers, and whatever profit retailers may make may not always be recovered in the accounting to be had. Should such a result follow, Wilson may proceed against the re-sellers or user for retailer's profit.

Under the findings by the District Court, we believe that the only conclusion is that there was a wilful disobedience of the injunction, and that it was an abuse of discretion on the part of the Court to purge the defendant in error of contempt.

The judgment is, therefore, reversed and the cause is remanded to the District Court, with directions to impose such punishment as may seem proper.

Reversed and remanded.

[Endorsed]: Opinion. Filed May 17, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Southern Division, and on the motion of counsel for the defendant in error to dismiss the writ of error therein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the said motion to dismiss the writ of error in this cause be, and hereby is denied, and that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the plaintiff and against the defendant in error, and that this cause be, and hereby is remanded to the said District Court, with directions to impose such punishment as may seem proper.

It is further ordered and adjudged by this Court that the plaintiff in error recover against the defend-

ant in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered May 17, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the second day of August, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Order Denying Petition for Rehearing.

On consideration of the petition filed June 15, 1920, on behalf of defendant in error for a rehearing of the above-entitled cause, of the reply of plaintiff in error to said petition for rehearing filed June 21, 1920, and of the answer of defendant in error to reply of plaintiff in error to petition for rehearing filed June 24,

1920, and by direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, before whom the case was heard, it is ORDERED that the said petition, filed June 15, 1920, on behalf of the defendant in error, for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Order Staying Issuance of Mandate Under Rule 32 Until After Supreme Court U. S. Passes Upon Petition for Writ of Certiorari, etc.

Upon application of Mr. Frederick S. Lyon, counsel for the defendant in error, and good cause therefor appearing, ORDERED mandate of this court under Rule 32 in the above-entitled cause stayed for a period of thirty (30) days from the 7th instant, on condition that the petition for writ of certiorari to be made to the Supreme Court of the United States be filed and docketed in said Supreme Court within the time so extended, and submitted to said Supreme Court agreeably to Subdivision 4 of Rule 37 of the

Rules of said Supreme Court, and in that event the said mandate be stayed until after the determination of said petition.

WM. H. HUNT,
United States Circuit Judge.

Dated: San Francisco, California, August 3, 1920.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed August 3, 1920. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON,

Plaintiff in Error,

vs.

UNION TOOL COMPANY,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-eight (138) pages, numbered from and including 1 to and including 138, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the defendant in error, and certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST may hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of August, A. D. 1920.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Elihu C. Wilson is plaintiff in error, and Union Tool Company is defendant in error, No. 3397, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court
of the United States.

[Endorsed:] File No. 27,878. Supreme Court of the United States, October Term, 1920. No. 521. Union Tool Company vs. Elihu C. Wilson. Writ of certiorari. Docketed. No. 3397. United States Circuit Court of Appeals for the Ninth Circuit.

Filed Nov. 8, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON, Plaintiff in Error,

vs.

UNION TOOL COMPANY, Defendant in Error.

Stipulation Regarding Certified Transcript of Record on Writ of Error from Supreme Court to the Above-entitled Court.

It is hereby stipulated and agreed that the certified transcript of record heretofore furnished by the clerk of the above entitled court for and as part of the Petition of Union Tool Company for a Writ of Certiorari from the Supreme Court of the United States to this Court, and filed in the Supreme Court of the United States in connection with said Petition for Certiorari, be taken and considered as a return to the Writ of Certiorari issued by the Supreme Court of the United States on October 22, 1920, in the above entitled case and used as the certified record and transcript of proceedings upon which said Writ of Certiorari shall be heard, tried and determined in the Supreme Court of the United States; and that a certified copy of this Stipulation, certified by the clerk of this Court, be returned to the Supreme Court of the United States in response to said Writ of certiorari.

Dated Los Angeles, California, November 4, 1920.

(Sgd.) G. BURTON WILSON,
Solicitor and of Counsel for Plaintiff in Error.

(Sgd.) FREDERICK S. LYON,
(Sgd.) A. V. ANDREWS,
(Sgd.) W. K. WHITE,
Solicitors and of Counsel for Defendant in Error.

[Endorsed:] Stipulation regarding certified transcript of record on writ of error, etc. Filed Nov. 8, 1920. F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON, Plaintiff in Error,

vs.

UNION TOOL COMPANY, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation Regarding Certified Transcript of Record on Writ of Error from Supreme Court to the Above-entitled Court.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation Regarding Certified Transcript of Record on Writ of Error from Supreme Court to the above entitled Court,"

filed in the above entitled cause on the 8th day of November, 1920, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of November, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3397.

ELIHU C. WILSON, Plaintiff in Error,

vs.

UNION TOOL COMPANY, Defendant in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to

send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation Regarding Certified Transcript of Record on Writ of Error from Supreme Court to the above entitled Court," in which said Stipulation it is provided that the certified Transcript of the Record heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on this 8th day of November, A. D. 1920.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of November, A. D. 1920.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,
By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] 521/27878.

[Endorsed:] File No. 27,878. Supreme Court U. S., October Term, 1920. Term No. 521. Union Tool Company, petitioner, vs. Elihu C. Wilson. Writ of certiorari and return. Filed Dec. 7, 1920.